1822

Geo. H. Kennedy.
May 8, 1822

A TREATISE

ON

THE LAW

OF

IDIOCY AND LUNACY.

By A. HIGHMORE,
AUTHOR OF THE LAW OF MORTMAIN, EXCISE, &C.

Equum est ut qui se regere non potest, regatur aliunde.
Grotius.

FIRST AMERICAN FROM THE LAST LONDON EDITION.

TO WHICH IS SUBJOINED

AN APPENDIX,

COMPRISING A SELECTION OF

AMERICAN CASES;

IN WHICH

SOME IMPORTANT SUBJECTS OF THIS TREATISE HAVE BEEN INVESTIGATED

AND

NEW PRINCIPLES SETTLED.

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PREFACE.

IN compiling the ensuing pages I have endeavoured to form such a brief arrangement as should concisely bring the whole matter readily to view, and facilitate an immediate reference to the subject connected under its principal heads; but I have not always succeeded to my wish in the compression; and am not without some fears that a more able architect will charge me with having mingled orders which he would have kept distinct, and omitted ornaments which would not have weakened the fabric: but if I escape without stronger censure I shall not be ashamed; if the work can be amended, the student and myself may profit by the lash of criticism.

I have ventured to avoid what is an essential in professional writings, the names of recent cases; if I have suppressed this source of reference with inconvenience to the reader, he must accept the apology of delicacy which the subject offers, and will be apprised, from

this and from the brevity with which some of the cases are mentioned, that my chief design is, to lead him to search the reports themselves rather than to rest upon the summary here given of the determinations; and to facilitate his search I have endeavoured to give all the references with accuracy.

It will appear by this work that the infirmities on which it treats arise either from a defect at birth, or from constitutional or accidental evils, sickness, violent impression, or some passion too highly inflamed. In all of these causes, except those of birth or accident, it is not perhaps incorrect to assume, that in most maniacal cases, a predisposed and radical nervous irritability forms an easy prey to the fatal malady; the patient "experiences great torment from a preternatural acuteness; an increased no less than "an impaired sensibility induces a state of "disease and suffering."(*a*)

The life of an ideot which has no intervals, and the tardy recovery of a lunatic from his paroxysms, offer examples alike distressful to shew how little ground there is to boast of human power—or vanity—or greatness, and how effectually our aspiring pride may be crushed by a visitation permanent in one

(*a*) Paley's Nat. Theol. 522.

case, and seldom thoroughly recovered in the other!

A state of ideotism is less deplorable, though not less shocking than that of madness: ideots are afflicted with no turbulent passions; they are innocent and harmless, and often excite pity, but never occasion fear;—the absolute naturals owe their wretchedness to a wrong formation of the brain, or to accidents in their birth, or the dregs of a fever, or other violent distempers.(*b*) But the case of a lunatic, whose morbid affection arising from either of the melancholy causes before-mentioned, not only awakens every concern, but excites every sentiment of horror! we have seen the most critical eye, which once penetrated the inmost chambers of science, driven from its pre-eminence, and rolling its wandering glare upon the empty shadows of the passing clouds;—we have seen men, whose mighty names have justly emulated the glories of renown, subdued to the coercion of those who once dared not to trace their distant footsteps;—we have seen the prey of keen disappointment, and the more awful sway of religious enthusiasm, thus wreck the helm of human happiness, and frustrate the fairest voyage of life!

(*b*) Orrery's Swift, 196.

Debarred from all the illuminations of the social compact, they are at once excluded from the reception and communication of its blessings; furnished with every organ they are nevertheless afloat in the sea of existence, without a port of destination, or a compass for their course; and the mind, which to all other human beings affords a resource when the world fails of its allurements, is to them the source and seat of their calamity!

Food, which is commonly an unremitted cause of enjoyment, is frequently to them the object of aversion; as often cast away, as imperiously demanded; or loathed in the very moment in which it is grasped with tumultuous violence!

The affections, which once were the solace and spring of their happiness, become the objects of their ungovernable rage; the very furies of their contempt and scorn!

The rational man provides for his necessities and has pleasure in this pursuit—he restrains the transient enjoyment of superfluities, that his laudable acquisitions may become the fruits of more permanent comforts; but the ideot and the maniac have necessities for which they know not how to provide, they have vague pursuits unaccompanied by

means and undirected to an end; they can reap no fruit, for they have neither planted nor pruned the branches!

If they were content to vegetate, their paroxysms of agony might be soothed; but mere instinctive existence raises them not to the level with the brute, who knows how to prevent becoming loathsome to himself. Philosophers have said, that there is more difference between man and man than between man and some other animals—the maniac is like neither; moon-struck and viewless, he is a nondescript of human horror! Fixed in the chain that surrounds him, he is incapable of improvement, the same yesterday, to day, and till death! He acquires nothing, and has nothing to lose—born to the highest inheritance, he sinks to the lowest abyss!

It is a self-evident truth that sanity or insanity are two qualities of the mind equally invisible with the mind itself; and as we do not know the minds of other men, except by their words, or their exterior actions, neither can we discover in any other manner the dispositions of the same mind.

But amongst the actions, which are as it were the natural signs of the affections of

the soul, there are two kinds, the one so personal, so attached, so inherent, so closely united to the person, that it is impossible to suppose them to be his without recognizing his sanity and capacity.(*b*)

The difficulty of decisions in cases of this nature must be obvious to every one; the court has to pronounce, not upon one of those questions of state wich relate to the birth or condition of parties, exterior qualities written in public registers, preserved in authentic muniments, and of which the principal proof is derived from the authority of the law itself, but upon one of those doubtful and difficult questions, of which the only subject is an invisible quality, that frequently conceals itself from the most enlightened witnesses, an interior disposition, of which acts and writings are only an obscure and imperfect image; in a word, when it is to decide upon the state of the mind much more than upon that of the body.(*d*) Hence, in the perusal of the following work the reader will certainly be enabled to add a considerable wreath of praise to the merit of the English law; which he will find uniformly exerted with unabating diligence and tenderness in administering to the protection of the most afflicted

(*b*) 2 Evans Pothier, 539. (*d*) Ibid. 553.

part of the community; and in carefully securing them against injury from their own hands, and injury from the self-interest of others; he will view the guardianship of this jurisdiction, vested in the first estate of the realm, and then delegated to the Judge whose office it is to preside over the highest Court of Equity, a delegation consonant to the tender regard of the Crown for the welfare of the people and to the delicate situation of the afflicted objects of its care: where their personal and pecuniary rights can be discussed and protected with peculiar attention, and the interests of their families at the same time preserved; where the severity of the principles of Courts of Law is mitigated and relaxed, and a more liberal and expanded judgment is pronounced upon a cool investigation of all the circumstances of the case.

It is a source of great satisfaction to these and to all other suitors of this Court, that its jurisdiction is generally committed to men who have already passed through a long course of general practice; or whose eminence has raised them to the highest seat in one of the Courts of Common Law; where their learning and integrity have signalized their official duties; and have finally trans-

planted them with an enlarged experience to this first tribunal of the Crown; men who have thus gradated through all the honours of their profession are become ennobled by their talents, and hand to their posterity a well earned fame surpassing the blazonry of their ancestors.

When I reflect that it is by the critical eye of such men, these pages may chance to be inspected, I tremble for my own fame: but as I know their candour, I venture to trust myself in their hands—hands in which the great interests of the nation are intrusted may well be supposed to give protection to an individual.

A. H.

Easter Term, 47 Geo. III.

PREFACE

TO THE

AMERICAN EDITION.

IN this edition of Mr. Highmore's Treatise it will be observed that the Appendix attached to the English Edition (which consists principally of *Practical forms* used in the English Courts) is omitted.

The short Appendix of American cases which is substituted, it is hoped will not be found useless to the Profession.

Exeter, N. H. July, 1822.

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A TREATISE

ON

THE LAW OF LUNACY.

CHAPTER I.

DEFINITIONS.

IDEOT is defined by Dr. *Johnson* to be a fool—a natural—a changeling—one without the power of reason. Ideotism is folly; natural imbecility of mind.

A man not of sound memory is explained by *Littleton* to be *non compos mentis—amens—demens—furiosus lunaticus fatuus stultus*, or the like. *Non compos mentis* is the most sure and legal.

Lunatic is one whose imagination is influenced by the moon: a madman. *Lunaticus, qui gaudetlucidis intervallis*, in *Beverley's* case.(*a*)

Non compos mentis is of four sorts:

1. *Ideota*, from his birth by a perpetual infirmity.(*b*)

2. He that by sickness, grief, or other accident, wholly loses his memory and understanding.(*c*)

3. One who hath lucid intervals, and is therefore *non compos* so long as he has not understanding.

4. One who, by his own intemperance, for a time deprives himself of his memory and understanding, as he

(*a*) 4 Co. 124.
(*b*) Co. Lit. 247. F. N. B. 530. 2 Ves. sen. 408.
(*c*) 4 Co. 124.

that is drunken ;(*d*) but this sort of *non compos* affords no privilege to himself, or his heirs ; and a descent does not take away the entry of the ideot.

As lunatics are affected or governed by the moon, so epileptics were anciently called lunatics ; because the paroxysms of that disease seem to be regulated by the changes of the moon.(*e*)

Mad persons are called lunatics from an ancient but now almost exploded opinion, that they are much influenced by that planet :(*f*) a much sounder philosophy hath taught us that if there be any thing in it, it must be accounted for not in the manner which the ancients imagined, nor otherwise than what the moon has in common with other heavenly bodies, occasioning various alterations in the gravity of our atmosphere, and thereby affecting human bodies. However, there is a considerable reason to doubt the fact ; and it is certain that the moon has no perceivable influence on our most accurate barometers.(*g*)

One, made ideot by sickness, which lord *Hale* called *dementia accidentalis vel adventitia;* and which he again distinguished into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases ; and though the party in every thing else be entitled to the same protection with an ideot, and though his disorder seem permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but that he may be restored to them, it makes the king only a trustee for his benefit without giving him any profit or interest in his estate(*h*).—17 Edw. II. ch. 10.—1 Bl. Com. 304.

Sir *W. Blackstone* defines a lunatic or *non compos mentis* to be one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason ;(*i*)

(*d*) 1 Inst. 247.
(*e*) Galen de diebus criticis, l. 3.
(*f*) 3 Gwillim's Bac. Abr. 526.
(*g*) Rees' Cyclop.
(*h*) Hale P. C. 30. 3 Gwillim's Bacon Abr. 526.
(*i*) 1 Bl. Com. 304.

but that a lunatic is indeed properly one who hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon: but under the general name of *non compos mentis*, which sir *Edward Coke* says is the most legal name, are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those who grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs.(*i*)

Fitzherbert(*k*) defines an ideot to be one who cannot count twenty pence, or tell who his father or mother were, or how old he is—or that hath no understanding or reason—what shall be for his profit, or what for his loss: but if he have such understanding that he knows and understands his letters, and to read by teaching or information of another man, then it seems he is not a fool nor a natural ideot, which seems more properly to belong to one who has had no understanding from his birth, and is therefore, by law, presumed never likely to attain any.(*l*)

The same rules of judging of insanity, prevails at law and in equity, though sir *W. Blackstone* seems to point at a difference:(*m*) for if a return to an inquisition, state the party to be incapable of managing himself and his affairs, from the weakness of his mind, a commission of lunacy will not issue, the court of chancery having never gone further from the ancient returns, which were *lunatic vel non*, than in allowing returns of *non compos mentis*, or insane memories; or since the proceedings have been in equity, of unsound mind, which amounts to the same thing. *Non compos mentis* is now indeed the proper technical term, being legitimated by several acts of parliament.(*n*)

(*i*) Inst. 246.
(*k*) P. 233.
(*l*) 1 Bl. Com. 302.
(*m*) 3 P. W. 130 2 Atk. 37 1 Com. 304.
(*n*) 1 Atk. 168. 2 Ves 407 3 B. Abr. 525

A person born deaf and dumb, is *prima facie* within the definition of ideot, but daily experience proves him otherwise.(*o*)

Lunacy is a partial derangement of the intellectual faculties, the senses returning at uncertain intervals.(*p*)

Madness is a total alienation of mind.(*q*)

These defects must be unequivocal and plain, not an idle frantic humour, or unrecoverable mode of action, but an absolute disposition of the free and natural agency of the human mind.(*r*)

A memory which the law holds to be sound, is, when a testator has understanding to dispose of, or a mind to manage his estate with judgment and discretion; which is to be collected from his words, actions, and behaviour at the time, and not from his giving a plain answer to a common question.(*s*)

Thus a will obtained in *extremis*, or upon any importunity, or guiding the hand, may be set aside. 8 Vin. Abr. 167. pl. 7.—1 Fon. Eq. 71.

Although courts of equity, in judging upon the point of insanity, are governed by the rules of law, yet if a man by age, or disease, is reduced to a state of *mental debility*, which, though short of lunacy, renders him unequal to the management of his affairs, the courts will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such acts as his interest, or the rights of others, may require.(*t*)

Lord chancellor *Thurlow* said, he was not against the practice of finding a man lunatic who was by the infirmities of age, rendered unequal to the management of his affairs;(*u*) but the more usual course is to appoint him a

(*o*) 1 Hale 34.
(*p*) 1 Hale 31. 4 Bl. Co. 24.
(*q*) 1 Hale 30. 4 Co. 124.
(*r*) 8 St. Tr. 322. 1 Hale C. 4. O. B. 1784. 257.
(*s*) 6 Co. 23. 1 Ch. Rep. 13. 1 Fon. Eq. 70.
(*t*) 3 P. W. 111.
(*u*) Prec. Cha. 229. Gilb. 4. 4 Bro. 100. 1 Fon. Eq. 64.

guardian, or some person, to act for him in the receiving and managing his property.

Weakness is not such a defect as will ground a commission of lunacy or ideocy ;(*x*) for a man may be weak as to figures, and not so as to his estates. Lunacy is a distemper occasioned either by disorder or accident ; and to one of these two cases commissions were formerly confined ; but at length this part of the prerogative, this paternal care was enlarged and extended to one who is *non compos mentis:* but here it stopt ; and this, at least, a court of equity insists must be found to entitle any one to a commission ; and therefore, though a jury find that one is incapable of managing his affairs, yet such a finding is insufficent : they must find him to be of unsound mind. A man may be of weak understanding, and of no resolution of mind ; but this is not sufficient to ground a commission : if he never was of better understanding, perhaps a commission of ideocy might lie ; but query.—If it be objectedthat he may be imposed on in disposing of his estate by will, it is answered that fraud and imposition upon weakness is sufficient to set aside a will of *real*, much more of personal estate. There was a case in lord *Hardwick's* time, where, though one could not be proved a lunatic, yet from the imposition on his weakness, the court relieved against a deed obtained from him ; immediately after the decree, the grantee got a release of the decree from him ; against this also the court relieved ; and it was said, that lord *Hardwick* ordered that he should not execute any future deed, but with consent of the court.

A person found a lunatic by a competent jurisdiction abroad, may be so considered in *England.*(*y*)

But as it is of considerable importance to ascertain, with some precision, the nature of that suspension of general lunacy, called a *lucid interval*, I know of no writer who has

(*x*) 2 Ves. sen. 408. (*y*) 2 Ves. jun. 588.

defined it with more accuracy or elegance than Mr. *D'Aguesseau*, the advocate general of *France*, in his pleading in the case of the princes *De Conti* before the parliament of *Paris*.—See *Evans's Pothier*, v. 2. p. 668.

"It must not be a superficial tranquillity, a shadow of repose, but on the contrary, a profound tranquillity, a real repose; it must be, not a mere ray of reason, which only makes its absence more apparent when it is gone, not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal, not a glimmering which unites the night to the day; but a perfect light, a lively and continued lustre, a full and entire day, interposed between the two separate nights, of the fury which precedes and follows it; and, to use another image, it is not a deceitful and faithless stillness which follows or forebodes a storm, but a sure and steadfast tranquillity for a time, a real calm, a perfect serenity; in fine, without looking for so many metaphors to represent our idea, it must be not a mere diminution, a remission of the the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health. So much for its *nature*.

"And as it is impossible to judge in a moment of the quality of an interval, it is requisite that there should be a sufficient length of time for giving a perfect assurance of the temporary re-establishment of reason, which it is not possible to define in general, and which depends upon the different kinds of fury, but it is certain there must be a time, and a considerable time. So much for its *duration*.

"These reflections are not only written by the hand of nature in the mind of all men, the law also adds its characters, in order to engrave them more profoundly in the heart of the judges."

"An action may be sensible in appearance, without the author of it being sensible in fact; but an interval cannot be perfect, unless you can conclude from it, that the person

in whom it appears is in a state of sanity; the action is only a rapid and momentary effect, the interval continues and supports itself; the action only marks a single fact, the interval is a state composed of a succession of actions.

"And to have a sensible proof of this, let us examine the case of those, who are only affected upon one or two principal points: one person is always seeing precipices, another supposes the people want to stop him; one transforms himself into a beast, another by a folly still more outrageous, believes himself to be God. If you do not introduce these subjects, they appear reasonable as to every thing else; put them upon these points, they immediately discover their weakness. The madman who believed that all the merchandize which came into the port of *Pyreum*, was consigned to him, could still judge very rea sonably of the state of the sea, of storms, of signs, from which he might hope the safe arrival of vessels, or appre hend their loss. The person of whom *Horace* has given so ingenious a picture, who always thought he was attending at a shew, and who, followed by a troop of imaginary comedians, became a theatre to himself, in which he was at the same time both the actor and the spectator, observed in other respects all the duties of social life:

> Cætera qui vitæ servaret munia recto
> More, bonus sane vicinus, amabilis hospes, &c.

"Yet who could suppose that such persons were in a condition to make a testament?

"If it was true that a proof of some sensible actions was sufficient to induce a presumption of lucid intervals, it must be concluded, those who allege insanity could never gain their cause, and that those who maintained the contrary could never lose it. For a cause must be very badly off, in which they could not get some witnesses to speak of sen-ble actions. Now, if from thence alone you were to draw

the inference of lucid intervals, and supposing them sufficiently proved, should conclude that the testament ought to be presumed to have been made in one of those intervals, there could never be any doubt of success. The consequence would be absurd, the principle therefore cannot be true.

" You see, sirs, what a lucid interval is; its nature is a real calm, not an apparent one; its duration must be sufficiently long to admit a judgment of its reality. Nothing can be more distinguishable than a reasonable action and an interval. The one is an act, the other is a state; the act of reason may subsist with the habit of madness, and if it were not so, a state of folly could never be proved."

" The nature of mere insanity, which being commonly the effect of temperament, is rather a weakness of organs, an habitual evil, than an accidental malady. It is otherwise with respect to fury, which may have a temporary cause, which is sometimes cured and frequently suspended; and, to make use of the elegant terms of the author of the factum, distributed by *Madame de Nemours*, in 1673; ' Infirmity of mind, particularly when it is the effect of temperament, is not cured by succeeding years; they only serve to fortify the complaint, which may even be considered incurable, being a privation which can never return to being and existence.' This was applied to the insanity of the *Abbe d'Orleans*."

" Two different states divide all men, if you except the really sage.(z) The one are deprived entirely of the use of reason, the others make a bad use of it, but there is not sufficient reason for declaring them to be in a state of folly; the one are destitute of the light of reason, the others have a feeble ray, which conducts them to a precipice; the former are dead, the latter ill; these still preserve an im-

(z) The word *sage*, being used in the *French* language to express both the elevation of wisdom, and a common state of sanity, has an effect in this discussion, which cannot easily be retained in translation.

age, and a shadow of wisdom, which is sufficient for filling in an ordinary manner the common duties of society, they are deprived of a real sanity of mind, but can lead a common usual kind of life; the others have even lost that natural sentiment which binds mankind together by the reciprocal performance of certain duties. Let us apply ourselves to this last character, which is the most sensible of all, and to which the application is the most easy.

" A sane person, in the sense of the law, is one who can lead a common and ordinary life; an insane person is one who cannot even attain the mediocrity of these general duties. *Mediocritatem officiorum tueri et vitæ cultum communem et usitatum.*

" But amongst those whom their weakness places below the last degree of men of common understanding, the jurists distinguish two kinds.

" The one only suffers a simple privation of reason; the weakness of their organs, the agitation, the levity, the almost continual inconstancy of their minds, place their reason in a kind of suspension and perpetual interdiction, and cause them to have the denomination of *mente capti*, in the laws, and in the writings of the jurists.

" In the others, the alienation of mind is less a natural weakness than a real malady, frequently obscure in its cause, but violent in its effects, and which, like a wild beast, seeks continually to break the chains that bind it, and it is this malady which properly bears the name of fury.

" The former, says *Baldus*, have an obscure and concealed fury, the latter have a striking and manifest insanity.

" The last are in a state of drunkenness, of transport, of frenzy. The first approach rather to the state of insanity, an extreme decrepitude, their reason, like that of an infant or a dotard, is imperfect or worn out, but they are both

equally incapable of making a testament, because in the one reason is almost extinct, and in the other it is tied and bound by the violence of their complaint.

" If these two states agree in this point, they are nevertheless distinguished by separate characters.

" The state of fury is more violent, but it sometimes admits the hopes of cure.

" The state of mere insanity is more tranquil, but it is almost always incurable.

" The one is susceptible of paroxysms and intervals, it rises all at once, it diminishes in the same manner.

" The other has not intermissions so marked, because the cause which produces it, that is to say, the weakness and debility of the organs, is nearly equal and uniform.

" Finally, a declared fury is so obvious and evident that it would be superfluous to distinguish the degrees of it, with reference to the incapacity of the testator, because it is certain that all furious persons, as long as their fury continues, are absolutely incapable of making a testamentary disposition.

" On the contrary, mere weakness of mind is more susceptible of degrees, and of considerable differences ; the incapacity increases and diminishes, in proportion to these degrees, and these differences: but who can fix them in general, who can mark precisely the frontiers, the almost imperceptible limits, which separate insanity from sanity, who can number the degrees, by which reason declines and falls into annihilation ?

" This would be to prescribe the limits of that which is illimitable, to give rules to folly, to be bewildered with order, to be lost with wisdom. The doubtful and uncertain point, at which reason disappears, and where incapacity becomes evident and manifest, can only be fixed by the particular circumstance of each individual case."

CHAP. II.

THE CUSTODY.

ON the first attack of lunacy or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy object in private custody, under the direction of the nearest friends and relatives:(*a*) and the legislature, to prevent all abuses incident to such private custody, has thought proper to interpose its authority by stat. 14 G. III. c. 49. continued by 19 G. III. c. 15. and made perpetual by 26 G. III. c. 91. for the regulation of private madhouses.—*See Postea.*

But when the disorder is grown permanent, and the circumstances of the party will bear such additional expence, it is proper to apply to legal authority to warrant a lasting confinement.

The king's prerogative, in this case, is well founded, and well recognized, upon the principles of equity and justice;(*b*) and therefore the legislature hath invested him with the custody of the lands of ideots, during their lives, and of lunatics, during their lunacy, for their own use.

At the making of the statute of *magna charta*, 9 Hen. III. the king was not possessed of this prerogative; for if he had, this statute would have provided against waste, &c. committed by the committee—the guardianship was vested in the lords, or others, according to the common law—ideots from nativity were then accounted only as infants within age, therefore the custody of them was perpetual so long as they lived, for their impotency was perpetual:(*c*) and the lord of whom their land was held, failing of a tenant to do him service, therefore took the wardship of him, as he did the custody of a minor.

(*a*) 1 Bl. Com. 304.
(*b*) 17 Ed. II. c. 9. Finch 95, 6. F. N. B. 531, 2. 4 Co. 126. Hob. 153. 3 Mod. 44. 1 Vern. 9. 137. 2 Cha. Ca. 70. 239. 2 Wms. 544. 638. Ca. t. Talb. 143.
(*c*) Fleta l. 11. Bract. 5. Cowell's Inst. 1.

It is certain that the king exercised this prerogative before stat. of 17 Edw. II. *de prer. regis;* for it appears to have been exercised by Ed. I.(*d*) And it is as clear that when *Bracton* wrote about the end of the reign of Hen. III. that the king had not possessed it. Hence it follows, that it must have been given to Edw. I. by some statute not now extant.(*e*) And it appears by the Mirror agreeing with *Fleta*, that this prerogative was granted by common consent: and this is acknowledged by *Stamford.*

It was anciently held that the king took to his own use, and therefore might demise at a rent, all the possessions of a natural fool, not of any other ideot, during his ideocy;(*f*) but not that which he had title to by entry or action: and therefore upon office, finding that the ideot's ancestors died seized of an estate tail, it was sufficient to traverse the dying seized, for that only entitled the king.

As it was presumed that natural fools could never attain any reason, their guardians, on this pretence, anciently took care of their lands in fee;(*g*) but, as many others also suffered by this kind of disherison, it was provided 17 Edw. II. c. 10. and generally conceded, that the king should have the custody of the bodies and inheritances of ideots and fools in fee,(*h*) whilst they were so from their birth, (yet otherwise if they lately became so) under whatsoever lord they held; and should give them in marriage, and save them from all disherison:(*i*) yet, with this addition, that he should not deprive the lord of his services, reliefs, and the like, until the ideots were of lawful age.

It seems to have been the general practice for the lord to commit the custody of the ideot's land, to another, for he is not liable to a forfeiture;(*k*) but this was disallowed after the above statute; unless some special custom could

(*d*) Brit. c. 66. 167.
(*e*) Mirr. Fleta 4 125.
(*f*) 21 Ed. III. Stam. Pr. 34. 1 H. VII. 24.
(*g*) 1 Bl. Com. 302.
(*h*) Fle. l. 1. c. 11. s. 10.
(*i*) 4 Co. 148. 3 Gwillim's Bac. Abr. 529.
(*k*) Shep. Ct. Keeper, c. 22. 172.

be shewn which authorized it: (*l*) and it was held in this case, that the committee could not bring an action in his name; being only as a servant appointed by the lord to keep possession for one who could not keep it for himself; (*m*) and this doctrine seems to have been founded on *Beverley's* case, (4 Rep. 126.) where it was agreed, that the ideot might have a *quare impedit* in his own name, which was afterwards recognised.

The principle of vesting in the crown the person and property of ideots, is also well-founded in the general principle of the monarchical part of the British constitution; for as the social compact is mutual by allegiance on the one hand, and protection on the other, so those who are incapable of allegiance, seem to claim that protection which, though they cannot purchase by their persons, is yet contributed for by their possessions, and called for by their imbecility: and *Fitzherbert* says, the king, by the law of right, is to defend his subjects, their goods and chattels, lands and tenements, and therefore, in the law, every loyal subject is taken into the king's protection: hence the king ought to have him, who cannot defend or govern himself, nor order his property, in his custody, and to rule him and his property.

Thus the king, by his prerogative,(*n*) has the sole interest in him, of granting the estate of an ideot, to whom he pleases without any account: (*o*) but it is otherwise in cases of lunacy; for there the grantee takes nothing to his own use, but must give security to account to the lunatic if ever he shall come to be capable, or else to his legal representatives:—this distinction has been carefully regarded, and it has been determined with great precision, that a jury may find a person an ideot, without adding "from his nativity," or for any number of years: for the

(*l*) Hut. 16. Eas. 16 Jas. I. Drury v. Fitch.
(*m*) Dyer, 25, 302. Noy, 27.
(*n*) Edward III.
(*o*) Moor 4. 2 Mod. 43. 8 Rep. 170.

law does not allow of any other ideocy, than from birth. The grant of the person of an ideot couples an interest with a trust during the ideocy, and therefore it descends to the executor of the grantee.(*p*)

The object of thus vesting the lands and goods of ideots and lunatics in the crown by statute, *de prerogativa regis*,(*q*) was founded upon the most benevolent principle, to protect them from waste and destruction, that they and their household, or family, may subsist and be competently maintained out of its profits, and that any surplus might be preserved for their use upon their recovery; hence it is that the lands cannot be aliened within that time, nor can the king seize any part of them to his own use, but is bound to repairs: (*r*) and if the party happen to die during his indisposition, the residue which was formerly applied, by the advice of the ordinary, in masses for his soul, is now paid over to his administrator or executor.(*s*)

The court of wards, where these cases were once cognisable, and which was established by 32 Hen. VIII. c. 46. A. D. 1540, was abolished by stat. 12 Car. II. c. 24. A. D. 1660.

Thus it appears, that though the custody of the ideot, and of his property, vests in the king, yet the freehold remains in himself and for his use: but he is, nevertheless, wisely restrained from alienation, and if he were to convey any part of his estate, the king, by *scire facias*, against the alienee would re-seize it.(*t*) Provided such alienation was made after inquisition found, from which time only the king's interest accrues: yet it has been held, that to prevent incumbrances, this finding has relation back to the time of the ideot's birth.(*u*) But, if a person had once understanding, and became a fool by chance or misfortune, the custody of him was not given to the king,(*x*) and if he

(*p*) 2 Mod. 44.
(*q*) 4 Co. 127. 17 Ed. II. c. 10.
(*r*) 3 Atk. 509. Stamf. Pr. Reg. c. 9. f. 35.
(*s*) Reg. 266. 32 Hen. VIII. c. 46.
(*t*) 13 Eliz. Dyer 302. 2 Rep. 125.
(*u*) 8 Rep. 170.
(*x*) Staundf. Prer. 9. 4 Rep. 124.

had so much knowledge as to measure a yard of cloth, number twenty pence, or rightly name the days of the week, he was not accounted an ideot, and the king had no prerogative. But in a case, where there was a general finding, and afterwards it was said, for so many years, and not from his birth,(*y*) it was held to have been from his birth, and the latter words to be surplusage, and the king's prerogative took place.

The king is thus rendered by the law the grand keeper and trustee of the persons and fortunes of ideots and lunatics, for their protection and maintenance during their lives, and at their deaths to render the estates to their heirs—so that they themselves cannot waste it, nor their right heirs be disinherited by their unfortunate situation.(*z*)

There is a great difference between an ideot and a lunatic, in the stat. of Edw. II. which says, that the king shall have the interest and custody of ideots ;(*a*) but when it speaks of lunatics, it says,that the king shall provide that their lands be safely kept without waste, and they and their household be maintained ; as in *Beverley's* case.(*b*)

The cases of infants, and ideots or lunatics,(*c*) though often coupled, are by no means similar, upon the whole view of them ; and therefore I have wholly avoided offering any parallel, and have endeavoured to avoid drawing a simile of one to the other: besides, it is to be considered, that the crown takes the one as a trust, though coupled with an interest, and the other purely as an interest service and duty owing to him, and which comes to the king in point of tenure ; and therefore the king may grant the custody of a ward *cum acciderit*, but there can be no such grant of the custody of an ideot :—if the emolument and advantage that by law are vested in the king, in the case of ideots, could be separated from the trust, then

(*y*) 3 Mod. 43.
(*z*) Bro. Id. 4, 5, 7. 2 Hen. VII. f. 3. 4 Co. 126. 8 Co. 170. 1 Hen. VII. f. 24. Dyer 302. Reg. 266.
(*a*) 17 Ed. II. stat. 1. c. 9 c. 10.
(*b*) 4 Co. 127. 2 Sid. 124. Co. 4.
(*c*) 1 Vern. 9.

clearly it might be transferred, and there has not been any such grant since the making the stat. of Edward : and the incovenience is apparent ; for if a grantee makes an infant executor, or dies intestate, what shall then become of the custody of the executor?

The distinction, established by statute, between the king's interest in the lands of an ideot and lunatic, is advanced in the books which speak of this matter : and, on this foundation, it has been resolved, that the king may grant the custody of an ideot, and his lands to a person, his heirs and executors,(*c*) and that he had the same interest in such an one as he had in his ward, by the common law. But the king cannot grant the custody of the body and lands of a lunatic to one to take the profits to his own use.(*d*)

In whatever county a lunatic happens to be, the care of him devolves upon that county.(*e*)

Where the custody of a son, who had committed acts of extravagancy and disorder when he was drunk, was committed to a friend by the father, and after his death continued by the mother, at whose death the son was discharby a *homine replegiando*, the court held that the trustee had no right to retain possession of the estates and rents to which the son was entitled, in order to convey them to persons to whom they were devised over in the event of his lunacy : and there appearing an undue contrivance to effect this, he was ordered to pay costs of suit. Barnard. 358. (1740.)

While the lunacy of any person is in question,(*f*) the court will make a provisional order as to his effects, till that point is determined ; and will stop the removal of the lunatic ;(*g*) and this is perfectly consistent with the general supervision vested in the crown in such unhappy cases.

(*c*) Bro. Id. 45. Dyer 25. Moor. 4. pl. 12. And. 23. 4 Co. 127. Co. Lit. 247.
(*d*) 3 Mod. 43. Skin. 5. 177. pl. 7. 2 Show. 171. pl. 164. Vern. 9. Moor 4. pl. 12.
(*e*) 2 Ves. jun. 382.
(*f*) 3 Atk. 635.
(*g*) Amb. 82.

Lord chancellor *King*, upon a regular application, sent a messenger to stop a lunatic at St. *Alban's*, who was on her road to *Scotland*, conducted by her husband's nearest relation ;(*h*) and ordered a commission to be issued, and the rents of her estates to be remitted hither.

A *caveat* may be entered against issuing a commission of lunacy ; and, on hearing the question, a personal examination in court will be ordered ;(*i*) and if upon the whole the lunatic gives coherent and rational answers about his estates and property, though he may be deficient in other subjects, and particularly as to the commonest question of figures, this weakness will be deemed no foundation for a commission. But this is not conclusive, further applications may be made, perhaps he may grow worse and worse, and at last become *non compos mentis*.

Where the property of a lunatic is too small to bear the expenses of a commission, the court, on petition for a reference to the master, to enquire the state of her fortune, and a proper maintenance, will make such an order, upon proper affidavits, without any reference for payment of dividends for the two ensuing quarters.(*k*)

There are many similar instances on the register's book.

And where imbecility of mind proceeded in a great degree from epilepsy,(*l*) lord *Ellenborough* ordered a physician to consult with those already employed, and afterwards in the most tender manner, to find the means of visiting the patient, without alarming her ; for the purpose of determining whether she was in a state of mind to manage her own affairs, and in the mean time restrained her from executing any power of attorney.

If a beneficed clergyman becomes lunatic, his living is not vacated thereby, so as to let in the patron to a presen-

(*h*) Ibid.
(*i*) 2 Ves. sen. 408.
(*k*) 4 Ves. jun. 798. 2 Dickens, 634.
(*l*) 8 Ves. 66. (1803).

tation : but it is most adviseable for his next relations to see that the duty be properly supplied ; otherwise the churchwardens may, *ex officio*, apply for a commission of lunacy, and with the permission or approbation of the bishop of the diocese, obtain a sequestration, and employ a fit person themselves, as a curate ; or the bishop, or his archdeacon, may appoint a curate.

In the case of *Hall* v. *Warren*,(*m*) after the finding under the commission, the living, which was in the diocese of *London*, was sequestrated ; and the incumbent soon afterwards died.

The object of the ordinary in sending out his sequestration, is, that the cure should not remain unsupplied, and to preserve its profits ;(*n*) which, as in cases of death, or during suits, is for the benefit of the successor, so in cases of lunacy are, upon the principles stated in another part of this work, for the incumbent upon his recovery.

The persons appointed sequestrators have a duty somewhat similar to that of a committee ;(*o*) first giving bond for their fidelity to the ecclesiastical judge in gathering the profits, and rendering a true account ; they cannot maintain any action at law for tithes in their own name ;(*p*) but only in the spiritual court, or before the justices of the peace, where they have power by law to take cognizance. in passing their accounts, they are allowed out of the profits a reasonable sum, according to their trouble in gathering the tithes, and for supplying the cure, and in maintaining the incumbent and his family.

If upon recovery he is dissatisfied with their measures, his proper remedy is in the spiritual court ; and if he files a bill in equity, the bishop must be a party.(*q*)

Upon an information in the king's bench against a physician, for assaulting and beating an alderman, under pre-

(*m*) 9 Ves. 605.
(*n*) God. ap. 14.
(*o*) Wats. 30.
(*p*) Johns. 122. Bunb. 192.
(*q*) Bunb. 192.

tence that he was a lunatic, for imprisoning him until he procured him to execute a letter of attorney to his wife, by colour of which he disposed of 1,000*l.* in value, apparently to his own use ; it appeared also that he had debauched his wife, handcuffed the husband, given him several strong purges in the night, and carried him out at one or two o'clock in the morning bare-headed when it rained. He was sentenced to stand in the pillory, to be sent to the house of correction in *Southwark*, to be whipped naked, and to be kept at work there for a year ; to be fined 600*l.* and to find sureties for his good behaviour during life—*Rex* v. *Dr. Fellows*, E. 12 Ann. Fortes. 166.

CHAP. III.

THE COMMISSION.

THE king's prerogative being re-established, we pass on to the process by which his authority is exerted.

By the old common law the writ *de ideota inquirendo* issued from the chancery to the escheator of the county, or to the sheriff; and there is a distinct writ in the register to enquire and examine the ideot himself directed to the escheator.

These writs were returnable into chancery,(*a*) and the ideot in person, or by his friend, might come into court, or sue out a writ to certain persons to produce him in that court, or in the council; and if he was there found not to be ideot or lunatic, the former writ and return became void.

The revenue arising to the crown from these writs, and from this custody, has been considered as a hardship upon private families; and so long since as in 18 James I. it came under consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent upon the crown in lieu of it: but the instances are very few, if any, of oppressive exertion of this power, since it seldom happens that juries have found a man an ideot *a nativitate*, but only *non compos*, from some particular time;(*b*) which as we have already suggested, has an operation very different in point of law.

The question of ideocy is tried before the escheator or sheriff, by a jury of twelve men, and if they find the party

(*a*) F. N. B. 232. 9 Rep. 31. (*b*) 1 Bl. Com. 303.

purus ideota, the profits of his lands, and the custody of his person may be afterwards granted by the crown to some subject who has interest enough to obtain them by application to the court of chancery. The jurisdiction which the chancellor has generally, or perhaps always exercised in these cases, is not necessarily annexed to the custody of the great seal,(*c*) for it has been declared by the house of lords, " that the custody of ideots and lunatics was in the power of the king, who might delegate the same to such person as he should think fit:" and upon every change in the person of the lord-keeper, a special authority, under his majesty's sign manual,is granted to the new chancellor or keeper for this purpose : and for this reason no application by petition, or otherwise, on the subject of lunacy, can be heard by the master of the rolls, except he sits for the chancellor.(*d*)

Hence it is that no appeal lies from the chancellor's orders upon this subject to the house of lords ; but to the king in council : for after the jurisdiction of the court of wards was taken away,(*e*) that of ideots and lunatics reverted back to the court of chancery, to which it originally belonged.

The method of proving a person *non compos*, is very similar to that of proving him an ideot.(*f*) It has been found preferable to proceed by a commission, rather than the ancient writ ; and therefore the first step which is necessary, is to present a petition to the lord chancellor, verified by proper affidavits, stating the situation and tenor of conduct, with some medical opinion thereon tending to shew, beyond a doubt, the insanity of the party : upon this petition a commission is ordered to be passed, under the great seal, to inquire into these facts, in the nature of the writ *de*

(*c*) 2 Atk. 553.
(*d*) Dom. Proc. 14 Feb. 1726. 3 P. W. 108. Christian's 1 Bl. Com. 303. note. 1 Dickens xxxiii.
(*e*) 2 Atk. 553
(*f*) 1 B. Com. 304.

ideota inquirendo ; this is the foundation of all the subsequent steps—all which are carefully detailed in the appendix to this work.

It is necessary to proceed upon the commission without delay ; in order that it may not appear that it was applied for in order to answer any sinister purposes : for to keep a commission without executing it for any length of time, may be of dangerous consequence ; to terrify and distress the party or his relations, or perhaps to make him obedient to improper government ;(*g*) and therefore, it being also a contempt of the court, will be superseded with costs.

And as it frequently happens that some of the relations take the charge of the person and effects of a lunatic,(*h*) the court, upon application by the heir at law, for a restitution, will make a provisional order as to the property, and direct that the lunatic should be produced on the next, or some subsequent day, for the inspection of the court.

When a man is found to be an ideot from his birth, by office,(*i*) if he supposes it false, he may apply in person to the court, and pray to be examined whether he be ideot or not; or his friends may sue a writ out of chancery, returnable there, to bring him into court for that purpose ;(*k*) and if he be then found not to be ideot, the office found, and the whole examination and the commission become void, without any traverse, or *monstrans de droit*, or other suit. The same doctrine holds as to lunacy, though the consequences are different.(*l*)

And here it may not be improper to remark, that no affidavit can be read which is sworn before the petitioner himself ;(*m*) and any petition founded thereon, will be dismissed with costs out of his own pocket. At common law it is always objected to and discountenanced, and equally

(*g*) 2 Atk. 52. Barnard. 356.
(*h*) 3 Atk. 635.
(*i*) 9 Co. 31.
(*k*) F. N. B. 532.
(*l*) 3 Atk. 635.
(*m*) 3 Atk. 813.

so in equity, from the inconvenience which would arise if such a practice were suffered.

A person found lunatick by a competent jurisdiction abroad, may be so considered here;(*n*) and if he be a mortgagee, within 4 Geo. II. c. 10. he will be ordered to convey.(*o*) And if a lunatic subject of this country, be resident abroad, or be carried thither, a commission may be issued, and evidence of his insanity, by affidavit of persons knowing him, must be procured to aid the finding him lunatic, besides the other proper evidence of his lunacy. But an inquisition in *England* is not a sufficient foundation for a grant of lands of a lunatic in *Ireland;* there must be an inquisition and a finding there under the great seal of *Ireland* for that purpose.(*p*)

The standing orders are, that a jury of the county or neighbourhood shall be returned; which *prima facie* carries an evidence that he is supposed to be resident in some county in *England;* but, notwithstanding this is the common form, and what is usual and ought to be done in common cases, that does not determine that in all cases of necessity it must be so.

These commissions *de lunatico inquirendo*, have long since superseded the old writs; but there is no precedent of a writ to the escheator to inquire of lunacy, for he was an officer of the county, to inquire of the revenue of the crown; and therefore where the lands came to an alien, or on forfeiture, or on death of a tenant *in capite*, to the king, where the guardianship came to the crown, the writ went properly to the escheater, because it was for the king's profit and interest. But in the case of a lunatic, where the King is to take no profit to himself, but merely a right arising from the care, the king, as father of his country, is to take of all his subjects not capable of taking care of themselves, there

(*n*) 2 Ves. jun. 587, 8.
(*o*) 1 Ves. 298
(*p*) 1 Schoal's Rep. 301. Hil. 1804.

should be no writ to the escheater, who was not a proper officer for that purpose.

It is true, that in all writs to the escheator, there is a direction that he should go to the party, but is not to found his return thereon, for he is to have a jury besides: whereas the writ to the sheriff in those instances, in *Fitzherbert* and the register, does not direct the sheriff to go to the person: the reason for which difference does not appear: but whatever was the ground, the commissions have put that out of the case, for they direct him not to go to the person, but to make the inquiry.(*q*)

The ground of turning these writs into commissions, was, that as it stood by law as to lands of aliens, or on forfeitures or guardianships, where the crown was to have the custody, they might be by writ to the officer of the king, or to commissioners: and as they might be to the one or the other, and the commissions were more large, they fell into that method.

The forms are various, so that nothing arises from them to shew the law to be, that the lunatic or ideot must be in in *England*. There can be no good reason why, if any subject having an estate in *England*, happens to be ideot or lunatic, but is out of the kingdom, there can be no enquiry *here:* no enquiry can be made beyond sea; for it is not to be executed by the commissioners only,(*r*) as in taking an answer, or assigning a guardian, which may be executed beyond sea;(*s*) but there must be a jury to inquire the fact, which must be of a county in *England*; then, if no inquiry could be here, both the person and his property would be in a very unfortunate case; and also the king, as to his prerogative. As to ideots the king has an undoubted prerogative; and that prerogative has prevented a great many proceedings for the care of ideots, and has occasioned a jury to find the contrary in many cases, to avoid that.

(*q*) Reg. 19.
(*r*) Ambl. 109.
(*s*) Amb. 112. 3 Gw B. Abr. 527.

But if any one can convey the ideot beyond sea, the king cannot have the benefit of the land and person as he ought; and as to lunatics, it would deprive them of that care and protection they are entitled to from the king, which he is bound by his regal authority and power to exert; for then no such commission would issue, or care be taken, which would be very unfortunate.(*t*)

If the commissioners and jury are satisfied by clear evidence that the party is a lunatic, they will find so without inspection; if not satisfied without it, they will make no verdict or return that he is not; and there it must rest, nor can any effect arise from it. Nor is this conclusive, for if he is beyond sea, and is of sound mind himself, the laying hold of his lands is notice to him, that such proceedings are against him, and he may come and appear, or any person opposing the commission in his behalf will be heard, and if insisted on, and reasonable evidence laid, he must be then inspected. The nature and circumstances of such a case warrant a commission, and the common forms of these orders is not evidence of the strict confined rule of law that cannot be exceeded. As to what lord chancellor said in *Beverley's* case, the reason given there, is not, according to lord *Hardwick*, the right or true reason, for there would be no fruit of such a commission against a dead person;(*u*) and it may issue into the county where the absent lunatic's property chiefly lies, and where chief part of the inquiry in consequence lies, rather than to any distant county on the coast, nearest to the place whereto he is gone.

Ideocy may be tried by inspection, because it may be discerned;(*w*) but lunacy cannot without a commission.

The commissioners and jury have a right to inspect the person of the lunatic, and examine him before them: they do not always cause him to be brought before them, unless

(*t*) 2 Ves. jun. 405. Exparte Southcot.
(*u*) 2 Ves. sen. 406.
(*w*) Skin. 5.

a considerable doubt was raised on the evidence as to his sanity; but they have a right to require it, without the prior order of court; and if the persons in whose custody he is, refuse to produce him, the court will censure them, and direct them to pay costs;(*x*) and commit them to the fleet prison for contempt:(*y*) and a habeas corpus lies to bring him up for that purpose.

The court denied a commission against a person of very weak mind,(*z*) but denying a commission does not thereby exclude all relief against any deed or will improperly obtained.

If the heir, upon whom lands descend, be lunatic at that time,(*a*) the laches of himself and of his friends of suing livery do not hurt him: otherwise if he had been *sanæ memoriæ*, since the death of his ancestor.—*Burcher's* case.

The commissioners may summon witnesses, as incidental to their office;(*b*) and, on application to the court, they will be ordered to attend, if they otherwise decline.

(*x*) 2 Ves. sen. 401. 1751.
(*y*) 1 P. W. 701.
(*z*) 2 Ves. sen. 407, 408.
(*a*) Hob. 137.
(*b*) 6 Ves. 784.

CHAP. IV.

HABEAS CORPUS.

UPON a habeas corpus to bring up the body of a lunatic, the practice is the same as on any other habeas corpus: (*a*) and the liberty of the subject being concerned, no indulgence, by first taking out a rule to return the writ, is to be granted: the return must be made, or the person produced immediately, or an attachment issues.

Where a person was too infirm and weak to be brought into court upon a habeas corpus, granted upon a representation of her being in the hands of improper persons, who were suspected of using artifices with her, in order to the obtaining a will from her when she was under very improper circumstances of mind to make one, and was too much under their influence, even if her understanding and memory had been more perfect and less disordered by intemperate drinking, a rule was made to shew cause why an information should not be exhibited against them for the misdemeanours charged in the affidavit, and that certain medical and other persons should have continual access to her, but she died the next day.(*b*)

Time for the return has been enlarged on the affidavit of a physician, that the lunatic was not fit to be brought into court, and the relations were about to apply for a commission; but the court refused to grant access to the lunatic, unless that application were made on behalf of a person entitled to ask it.(*c*)

But the court have the power of committing any one

(*a*) 2 Stra. 915.
(*b*) Rex. v. Wright, 1 Geo. III.
(*c*) 3 Burr. 1363. Burr. 1099.

who has the care of the person for not producing him.(*d*)

Access was denied to a person entitled to an appointment, though merely to see the capacity of executing it.(*e*)

(*d*) 1 P. W. 701. 1721. (*e*) 6 Ves. 7.

CHAP. V.

OF EXECUTING AND RETURNING THE COMMISSION.

THE general rule is, that the return must be a clear and unequivocal answer to the commission: as, if the commission were to inquire whether A. was a lunatic, or enjoyed lucid intervals, so that he was incapable of governing himself and his own affairs; a return, that he is from weakness of mind incapable, and has been so for certain years, but how he became so they know not, is a void return: that he is not always in his senses, like other men, and that it arises from fear and provocation; (*a*) or, is not of sufficient understanding to manage his own affairs; or so weak in judgment and understanding as not to be capable of marrying, &c. and this for twenty years past; or not a lunatic, but incapable, &c.; these are all void, for they do not find by express words that he was or was not a lunatic:—the general words are of unsound mind.(*b*)

By the statute, an incapacity for marriage is made the consequence of a person's being found a lunatic; (*c*) as the act uses the word lunatic only, it would be of dangerous consequence to add a different sort of lunacy here, and under the act. There must be an absolute finding: and they cannot find an inference only without finding a positive fact.

On a writ of dower, it was insisted that the party was ideota,(*d*) and pleaded that she was *sanæ mentis*. Sound mind is of certain signification, and known in our law; and you cannot, in pleading say, that a man is *lunaticus*, but

(*a*) 3 Atk. 168, 9.
(*b*) 3 Atk. 168.
(*c*) Finding ideocy for so many years is a good return. 2 Ves. 408.
(*d*) 2 Saund. 352.

non sanæ mentis. Here it would be impossible upon the inquisition to know what to plead; and if the court should break that great land-mark, that a person to be a lunatic must be found to have some degree of unsound mind, they would not know how to stop.

The commissions are framed in analogy to the writ *de ideota inquirendo*;(e) and if the inquisition is whether A. is a lunatic, they cannot find him an ideot; and there must be a new commission.

The court, though desirous of maintaining the prerogative of the crown in its just and proper limits, yet, at the same time, is cautious of making precedents on its records of extending that authority, so as to restrain the liberty of the subject, and his power over his own person and estate, further than the law will allow.

The prerogative, and the rule of law, are in this respect still the same, and cannot be altered but by parliament; for it is only the form of *returns* that is changed by the court.

If the return departs from the direction of the commission it is void; but though it differ in words, yet if there are equivalent words, it will not be such as to quash it; for it is not a variance in words, but in the sense and meaning, that will quash it.

The uniform language of returns is, lunatic, or *non compos*, or insane memory; and they are ordered to continue so: and a considerable distinction has been always preserved between insanity and weakness.

A precision is materially necessary; for a finding that the party was worn out with age and incapable, is bad; because she might be bedrid and yet not insane: a weakness of mind may create incapacity of governing from violence of passion, and from vice and extravagance; and yet not be sufficient under the rule of law and constitution

(e) 3 Atk. 169.

of this country to found a commission : possibly the law may be too strict, and in some cases it might be useful that a curator or tutor should be set over prodigal and weak persons, as in the civil law.

Being *non compos*, of unsound mind, are certain terms in law, and import a total deprivation of sense ; now weakness does not carry this idea along with it : but courts of law understand what is meant by *non compos*, or insane, as they are words of a determinate signification. Lord *Coke's* definition is, that they are persons of non sane memory.

The term *non compos mentis* is used in the statute of limitations,(*f*) which has relation to the time of the removal of the disability ; this term is therefore legitimated by this and several statutes ; and, like many other expressions, has been sanctioned by acts of parliament to a particular sense, which before may have borne a different meaning.

Lunatic is a technical word coined in more ignorant times, under an imagination, that the parties were affected by the moon ; but it has since been discovered by philosophy and ingenious men, that their derangement is owing to a defect in the organs of the body.

Thus the reason of the court enlarging the manner of finding, was to avoid the difficulty of obliging the jury to find express lunacy, because they might think it more a case of ideocy, which was equally a case that called for the care of the court.

The grant of the custody of an ideot, is not limited during the ideocy, for that is deemed perpetual ; nor has it ever been extended to the executors of the grantee, but ceases with his death.

Finding that a party was ideot for any number of years past is repugnant ; for ideocy implies *a nativitate*, which is the reason it is tried by inspection, whereby it may be dis-

(*f*) 21 Ja. I. c. 16. s. 7.

cerned; this is not the case with lunacy, which cannot be discerned in its lucid intervals, which constitutes the grand distinction between them.(*g*)

In lord *Wenmon's* case they delayed, because of the consequences of finding; but on an inquisition of lunacy, they found him a lunatic immediately.(*h*)

Every return to an *habeas corpus*, and also to a commission, must contain such a certainty as shall be unequivocal, and not leave the matter in doubt; it being for the purpose of informing the court as to facts, whose duty it is to declare the law arising therefrom; and also to apprize the opposite party of what is meant to be proved, that he may have an opportunity of answering or traversing it; for the facts are traversable—the law is not traversable. If the return be certain on the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad: if presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return.(*i*)

A return finding the lunacy, but omitting to state whether the person had any lucid intervals, is not an objection to it in point of form:(*k*) but it seems best to refer to the day when any act of lunacy was committed, and shew whether there were any lucid intervals since; and the secretary said this was the usual practice. Where there is any misbehaviour in the execution of the commission, the court may quash it and issue a new commission.(*l*)

In producing evidence upon executing the commission, it should be considered by the solicitor, that not only insanity is a fact, but it is an habitual fact, a disposition, a permanent affection of the mind which is to be proved:(*m*) and as habits are only acquired by reiterated acts, they are hardly ever proved, except by a long succession,

(*g*) Skin. 5.
(*h*) 3 Atk. 170. 4. 1744.
(*i*) Doug. 154.
(*k*) Rex v. Lyme Regis.
(*l*) 5 Ves. junr. 450. 1800.
(*m*) 3 Atk. 6.

a continuity, a multiplicity of actions, of which it is impossible to have any other proof than the testimony of those who have been intimate and attentive observers of them.

Most acts of insanity are positive ;(*n*) a single action may sometimes suffice for a perfect proof of folly, because there are some acts which bear so marked a character of illusion, of derangement, of alienation of mind, that it is impossible for a man in his senses to commit them ; and though a person in a state of insanity may perform sensible actions, yet a sensible person cannot commit a distinguished act of folly.(*o*)

(*n*) 2 Evans's Pothier, 593. (*o*) 2 Evans's Pothier, 598.

CHAP. VI.

OF CONTROVERTING THE COMMISSION.

A COMMISSION of lunacy may be controverted by petition to supersede it, to traverse it, or for an issue to try the fact at law.

The *traverse of an inquisition* is matter of right at law, by 2 Ed. VI. c. 8. s. 6.(*a*) and is no favor, but *de jure*;(*b*) and carries the fact to be tried at common law: it is a short process, stating the inquisition, and taking the common traverse upon it, and the attorney general joins issue; the verdict, or finding, must be correspondent to the issue.(*c*)

An inquisition is always admitted to be read, but is not conclusive evidence, because it may be traversed.(*d*)

Where there is any mistake in the execution of the commission, it must be examined into, and the court, if they see cause, may quash it, and direct a new commission; but there is no *melius inquirendum*, for that is only grantable on the part of the crown, which cannot traverse as the subject can; and therefore the court directs a new commission.

If at the second inspection, the lunatic appears better than he did at the first, and this does not prove him to be fool or mad-man, the finding must be accordingly.

Fitzherbert N. Br. shews, that it is a common method to inquire by inspection, after an inquisition returned; and there have been many cases of that sort; but if upon inspection the chancellor is at all doubtful, there ought to be some better method of determining it, and the statute of Edward VI. seems to be made for that purpose.

(*a*) 2 Ves. jun. 833.
(*b*) 5 Ves. jun. 450, 452.
(*c*) Ibid. 452.
(*d*) 2 Atk. 412.

" If any person be, or shall be, untruly found lunatic, &c. all persons grieved, or to be grieved by any office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have the like remedy and advantage as in other cases of traverse, upon untrue inquisitions or offices founden."

But, although the party is thus entitled to traverse, he must come to chancery for leave to suspend the custody.(e)

To try the question by an issue, is of greater expence than a traverse : a traverse is binding upon the lunatic, but not upon him to whom the grant of the custody of the land was made, who claims as a purchaser. It would certainly be productive of great mischief if this grant were suspended on slight grounds : but the court have always exercised that right on serious and well-grounded applications ; and if any thing has been done already, it will abide the event of the traverse.

There is no case where an ideot has traversed by attorney ; though many where a lunatic has : and therefore an ideot appears in court in *propria persona*, when he asks leave to traverse, but a lunatic does not : and there ought by 18 *Henry* VI. c. 7. to be a month's time between the return of the inquisition and the grant of the custody of the land,(f) in order that parties may have time to come in and tender such traverse.

In all these inquisitions they are not conclusive ; for the parties may bring actions at law, or file bills in equity, to set aside conveyances ; therefore it is better to bind the party to abide the issue of a traverse.(g)

When the court thought it a hard case in ideocy, the custody was not granted without leave to traverse the in-

(e) Ley, 86. 8 Co. 168. Jones, 198. Show. 199. S. C. Skin. 45, S. C. Fanes's Ents. 652.
(f) 3 Atk. 5, 6, 7. 1743.
(g) Trem. P. C. 653. 4 Co. Sadlers.

quisition—by lord chancellor *King :* and peculiar circumstances will guide the court in this discretion ; as the expence and income, where an estate lay in the *West Indies*, of changing the management ;(*h*) and where a person was found lunatic under two inquisitions, and the court would not allow a traverse of the second.(*i*)

Not only the lunatic, but his heir, is bound upon the traverse :(*k*) or it would have been a very fruitless act of parliament. A trial, by inspection is the proper trial by the lord chancellor, as to the person : when there has been a solemn trial in the life-time of the lunatic, who is bound himself, to say that, after his death, when he cannot appear in person, and cannot be inspected by a jury, it should still be open to a traverse by the heir at law, carries a great absurdity with it.

The alienee of a lunatic may traverse on inquisition, as well as the lunatic himself :(*l*) suppose both of them traverse, and he is found a lunatic at the time of the alienation ;(*m*) the alienee is certainly bound. It is said that he is bound, because he is a party to the first, but that the heir at law shall not ; which would be a manifest injustice ; and still stronger in the case of ideocy, where the crown grants the custody and profits of the estate during the ideot's life : the ideot dies, and according to the doctrine attempted, the heir at law might come in and traverse the ideocy :—but the executor of an ideot cannot have an account against the grantee for the profits incurred during the grant from the crown.

The lunatic is bound, and cannot traverse the inquisition when he recovers his senses. If the grantor was really a lunatic at the date of his grant, it is absolutely void ; and if void, so as not to pass the estate, it is void, so as not to bar an entail.

(*h*) 3 Atk. 185. 1774.
(*i*) Ibid. 184.
(*k*) 3 Atk. 308.
(*l*) Ibid. 312.
(*m*) Amb. 706.

But a common recovery might have a different operation from a deed to lead the uses; for a common recovery will bar the entail though there be no deed to lead the uses, because it is in respect of the satisfaction of estate in value which creates the bar; yet if such a deed as this does not pass the estate, then the deed can have no operation, as a recovery of an estate in satisfaction. But a letter of attorney, executed by the lunatic, which is a deed, though revocable, yet is very different from a common recovery; and therefore every thing done in pursuance of it is void: as was determined in *Whitworth* and *Cholmely*, 1744.

But if he be found, not a lunatic, only a weak man, and the deed was obtained by fraud or imposition; the court must, on a bill filed after his death, take it exactly in the same light as it stood before his conveyance; if the alienee gained no right by this deed, he can convey nothing to the trustee under the order of court; therefore the heir at law is not injured.

But if the entail is barred, those uses are not existing, and no prejudice can arise from the conveyance directed by the court.

A conveyance made to a trustee for the lunatic, is good—but will not bar any right which the heir at law might appear to have on a trial at law.(*n*)

The committee cannot join issue on a *scire facias*, to traverse the commission; but it must be in the lunatic's own name.(*o*)

If, upon a traverse, the party be found not a lunatic, at the time of the commission issuing; or it be superseded before any part of the property could vest in the crown, no costs will be allowed to the party taking it out, however meritorious their intention: for there is no fund out of which the costs can be taken.(*p*)

(*n*) 3 Atk. 313.
(*o*) 2 Sid. 124.
(*p*) 2 Ves. jun. 832.

An order on a petition in lunacy, cannot be made for sale of real estates to pay debts; so as to prevent a bill by creditors:(q)—it must be done by bill.

The proceedings on the commission are on the law side of the court, and can only be redressed, if erroneous, by writ of error in the regular course of law.(r)

When a lunatic traverses the inquisition, he is to be considered as a defendant, opposing the title found for the crown, without setting up any in himself, as he must do in a petition of right: and the record must be carried down to trial by the prosecutor of the commission; for the lunatic cannot be deemed a plaintiff, and so have power to delay the crown: and if illness prevents his appearing at the trial, and a verdict pass for the crown, on no defence, the court will grant a new trial.(s) *Rex* v. *Roberts.*

A lunatic having made a different appearance,(t) on the second time of his being inspected, was allowed to traverse the inquisition, and the grant of the custody was suspended.

Upon the return of the traverse to the inquisition, finding that the party was a lunatic at marriage, and at taking the inquisition, but at the time of a verdict directed as to the fact, was not a lunatic, the commission was superseded; but the court doubted the propriety of such a double issue. *Ex parte Ferne.*(u)

An entire stranger, and having no interest, cannot traverse a commission:(x) the court has never been in the habit of discouraging any fair and reasonably provident application with regard to the situation of a person allowed to be a lunatic, if he is more pressed in the execution of the commission than a tender and humane consideration of his circumstances would authorise, or of a person not allowed to be lunatic, but made the object of

(q) 2 Ves. jun. 556.
(r) 3 Bl. Com. 427.
(s) 2 Stra. 1208.
(t) 3 Atk. 7.
(u) 5 Ves. jun. 832.
(x) 8 Ves. 579.

a commission. The law has provided that no person shall be in such a situation deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding admitted to be *ex parte*, which the law supposes may collect mistake ;(*y*) and therefore has given a right to certain persons to traverse the inquisition. See 2 Ed. VI. c. 8. s. 6. And as the true interest of lunatics is not consulted by persons, who act upon their own views of the sanity or insanity formed upon occasional conversations, and come too rashly to the court without sufficient inquiry, yet it is the duty of the court not to censure too hastily any application upon a subject so very important as this ; but costs will be granted, if pressed for by the other side.

A person who has entered into any contract with a lunatic,(*z*) is deemed to have such an interest as to entitle him to traverse the commission ; for such a person having become a *bona fide* owner in equity of his property, must necessarily be aggrieved by the finding, and he may shew that the party never was lunatic(*a*)—Lord *Eldon.*

Where a person having, for several years since the date of the finding,(*b*) with the knowledge of all persons who had any interest in, or feeling about, the management of his affairs, done all the acts the most sane man is entrusted to do; and with regard to his amusements, occupations, mode of life, and every circumstance belonging to the question of sanity, been permitted for years to act at his own discretion, without any providing, and so long as a particular topic is not mentioned,his family permitted him to act without restraint, is scarcely to be deemed lunatic. There are persons who are insane upon particular points, who, if these points are not touched upon, act discreetly in their own affairs, and even as trustees for others ; still it

(*y*) 5 Ves. 450. 832.
(*z*) 7 Ves. 262. 1802.
(*a*) 9 Ves. 610.
(*b*) Ibid.

may be wise not to quash commission issued against them, but give them the right of trying the facts by a traverse.

It may be quashed or traversed for not having been executed in the county near his abode, and competent notice given of it.(*c*)

There is no part of the duty, said lord *Eldon*, ch.,(*d*) that occurs in the exercise of this jurisdiction, more unpleasant, and requiring greater caution, than that of determining when a commission should be superseded; for though you may, upon evidence, arrive at a safe conclusion, establishing lunacy, it is very difficult to determine when the mind is restored; depending upon the circumstance, whether the party is led to those topics upon which it was affected. In the case of Mrs. *B*————(*e*) lord *Thurlow* said, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before: and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property, or with reference to such a case as this;(*f*) for suppose the strongest mind, reduced by the delirium of a fever, or any other cause, to a very inferior degree of capacity, admitting of making a will of personal estate, to which a boy of the age of fourteen is competent, the conclusion is not just, that, as that person is not what he had been, he should not be allowed to make a will of personal estate. There may be frequent instances of men restored to a state of mind, inferior to what they possessed before; yet it would not be right to support commissions against them. On the other hand, if lunacy has been satisfactorily established, particularly where there is a tendency to do great personal harm to others, I ought to be sure, by the evidence of persons having competent knowledge upon the whole of the

(*c*) 9 Ves. 610.
(*d*) 11 Ves. 10. (1805.)
(*e*) 3 Bro. C. C. 441. Atty *v.* Parnther.
(*f*) *Ex parte* Holyland.

subject, that there is an absence of that disorder; and those tendences may not be brought forward, when it may not be generally known, that there is any providence of the law thrown over the individual.

There may be considerable evidence of the recovery; but if the whole nature of the case has not been stated to the physician, who swears that he has frequently seen the petitioner, and believes him to be of sound mind; unless he can go further, and state that the ground of the opinions of those medical gentlemen who thought otherwise, was laid before him, that he has had an opportunity of considering it, and the result of the whole is, that just and accurate as those conclusions were, or inaccurate upon his own conclusion, satisfactorily formed, the present state of the party is as he represents it; unless the affidavit comes with some such exposition, though the conclusion may be right, not having those particulars before me, I cannot try the truth of the inference. The question may be, whether the existence of the commission may not be necessary, in order to secure to the party the utmost comfort and happiness he is capable of enjoying.—An issue was therefore directed.

It is understood that if an ideot has title to land, either by entry or action and has it not in possession, the king does not seize it.(g)

(g) Broke's Abr. tit. Ideots.

CHAP. VII.

THE COMMITTEES.

Section I. *Who may take these Offices.*

IN the case of ideots and lunatics the civil law agrees with ours, by assigning them tutors to protect their persons, and curators to manage their estates. For if a man, by notorious prodigality, was in danger of wasting his estate, he was esteemed *non compos*, and committed to the care of curators or tutors, by the prætor;(a) and, by the more ancient laws of *Solon*, such prodigals were branded with perpetual infamy.

But with us, when a man, on an inquest of ideocy(b) has been returned an unthrift, and not an ideot, no further proceedings have been had. The propriety of the practice seems to be very questionable, says Sir *William Blackstone*.(c) It was doubtless an excellent method of benefiting the individual, and preserving estates in families: but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. *Sic utere tuo, ut alienum non lædas* is the only restriction our laws have given with regard to economical prudence; and the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are, perhaps, not a little conducive towards keeping our mixed constitution in its due health and vigour.

The lord chancellor,(d) rather than the court of chancery, after the commission is returned, usually commits

(a) Potter Ant. 1, 26.
(b) Bro. Abr. Ideot 4.
(c) 1 Com. 304.
(d) 2 Dickens, 555.

the care of the lunatic, with a suitable allowance out of his estates for his maintenance, to some friend or relation, who is then called the *committee*.

To prevent sinister practices, the care of his person is not committed to his heir at law, because it is his interest that the lunatic should die. But, it hath been said, that there lies not the same objection against his next of kin, provided he be not his heir;(*e*) for it is his interest to preserve the lunatic's life, in order to increase the personal estate, by savings which he or his family may hereafter be entitled to enjoy.(*f*)

But this rule of not appointing the next of kin(*g*) entitled to the estate in remainder to be committee of the estate, has not of late years been adhered to.

The distinction upon which, in the cases referred to in the margin, that rule was considered not applicable to the next of kin, from their interest in the probable increase of the personal estate during the life of the lunatic, is not satisfactory. To those upon whom the suspicion, which was the foundation of that rule, could attach, immediate gain is a stronger temptation than the hope of future advantage, subject to disappointment, not only by the casualties of life, but also, where the state of the lunatic admits it, by the liberal application of his income for maintenance.

The heir at law is generally made the manager or committee of the estate, it being clearly his interest, by good management, to keep it in condition: accountable, however to the court of chancery, and to the *non compos* himself if he recovers; or otherwise to his administrators.(*h*)

If the chancellor acts improperly, in granting such custodies, the complaint lies to the king in council.(*i*)

The statute(*k*) which gave the guardianship of idcots' lands to the king, on his finding them maintenance out of

(*e*) 3 Brown, 510.
(*f*) 2 P. W. 544. 638. 1 P. W. 262.
(*g*) 7 Ves. 591.—1802.
(*h*) 1 B. Com. 304.
(*i*) 3 P. W. 108. Bro. 267.
(*k*) 17 Ed. II. st. 1. c. 9.

the profits,extended not to copyhold lands,for the prejudice that would thereby accrue to the lord; but yet all alienations made by an ideot of his copyhold lands, after office found, may be avoided by the king.(*l*)

And it hath been holden, that though the king cannot have the custody of an ideot or lunatic copyholder, on this account, yet the lord of a manor *de communi jure*(*m*) hath not the custody of the lunatic's lands, but there must be a special custom to warrant it.(*n*)

But it has been resolved that the lord shall have the custody of one *mutus et surdus*, without alleging any custom; for otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom as where there is; and the same reason seems to apply to a lunatic.(*o*)

Although the king hath the sole direction of these cases, yet a private person may confine a friend who is insane; and bind and beat him in such a manner as such unhappy cases often require.(*p*)

So power is given by statute to the magistrates to confine *vagrants* insane. 12 Anne, c. 23. rep. by 13 G. II. c. 24. and finally repealed by 17 G. II. c. 25. But see *postea*.

The custody of a lunatic may be granted to a feme covert,(*q*) though she be not *sui juris*, but under power of her husband; and where it was granted to husband and wife, she being next of kin, and died, the husband's right determined: for the grant was joint, and a mere authority without interest.(*r*) (1735.)

A trustee under a will may continue the person of the lunatic in the same custody, as he found him in, unless he discover acts of cruelty and oppression, want of necessaries, &c. and he may retain the profits of an estate for

(*l*) 4 Co. 126. Co. Cop. 152. 3 Ba. Abr. 532.
(*m*) Noy 27. Hob. 215.
(*n*) Lutw. 373.
(*o*) Cro. Ja. 105. Evers and Skinner
(*p*) 2 Roll. Abr. 546.
(*q*) 3 P. W. 111. n.
(*r*) Ca. Eq. Talb. c.143. Wyatt Prac.

persons to whom they were devised over in the contingency of an intermediate person being lunatic, if he prove to be so: (*s*) and if any connivance be proved to keep him out of his estate, by setting up his lunacy, and he be not so, costs of suit will be ordered.

A devise by will of the custody of a lunatic, niece to one who was no relation, is absolutely void: the father himself could not make such a will,(*t*) though he might dispose of the guardianship of his child during minority; yet, after twenty-one years of age, he has no such power.

The same person may be committee of the person and of the estate, except the heir at law, to whom the court never commits his person.(*u*)

In selecting the proper persons to fill these offices, the prudent caution of the court has generally been guided by the principle of uniting interest with duty, as already stated:(*x*) and if there is any strong aversion, however groundless, in the disordered mind of the lunatic, against a party proposed as committee of his person, this will be regarded by the court, whose endeavours are to make these unfortunate people as easy as possible.

The court never grants the custody of the person to two committees,(*y*) for this has been found to occasion suits and expence: but there is no objection to any one who will have a share in the personal estate.

A person named committee by the court,(*z*) suffered the lunatic to dwell with the committee of his estate, who was his uncle, during thirty-two years.—On a petition from one of the next of kin to remove him, and to lessen his allowance, the court refused both, declaring that the uncle, from the length of time, in which he had shewn him the utmost tenderness, was the properest guardian; that the

Reg. 56. Forester, 143.
(*s*) Barnard. 359.
(*t*) 2 P. W. 638.
(*u*) 3 Brown, 510. 2 P. W. 638.
(*x*) 2 P. W. 637. 6 Ves. 427.
(*y*) Ibid. 638.
(*z*) 2 P. W. 263. 3 P. W. 108—110.

allowance contributed to his comfort; and that he had long been in that unhappy condition. Yet in the eye of the law a lunatic is never to be looked upon as desperate, but always at least in a possibility of recovering; and then the benefit and comfort to be guarded by the court, where no creditor complains, are for his benefit, nor for any next of kin, all of whom he may survive.

The bankruptcy of the committee of the lunatic's person is a sufficient cause for his removal from the management of the friend destined for his maintenance.(*a*) But the mere custody of the person will not be changed if the master find that, for the comfort of the lunatic, it should be continued.

Although it is unusual for a brother to petition to be committee, and that a receiver be appointed for the estate, on the refusal of the heir at law, who, with the brother, is the only next of kin, and not able to give the requisite security; yet the court has appointed the brother committee of person and estate, with restriction not to receive; and referred it to the master to appoint a receiver, to account and pay to the accountant-general, after the necessary maintenance.(*b*)

This guardianship shall not be committed to any that will make gain of it, or who is concerned to outlive the lunatic, as being nearest of blood, and entitled to the administration; and the allowance must be liberal and honourable for his maintenance;(*c*) but there is no instance of any allowance to the committee for his trouble.

And the choice of the court as to the committee of the person is generally influenced by the sex of the party, as well as by other circumstances.(*d*)

The next of kin and expectants are not to be consider-

(*a*) 2 Ves. jun. 2. Wyatt, P. R. 276.
(*b*) Amb. 104.
(*c*) 2 Fon. Eq. 244. 10 Ves. 104.
(*d*) 2 P. W. 635. 1 Fon. Eq. 59.

ed, but the lunatic is to have every comfort which his circumstances will admit.(*e*)

If the lunatic be a married man, his wife must have the commitment of his person, and an allowance suitable to his estate and rank. His estate must be accounted for; and if he die without issue, a moiety goes to her as is usual.(*f*)

The grant to a committee does not extend to his executors or administrators; nor is it assignable.(*g*)

And if a wife be insane,(*h*) and her husband has the care of her, the court, in making account of dividends of her separate estate, as directed against the husband, will order due consideration to be had of his extra expence of maintaining her.

By the custom prevalent in the province of York, before the statute of 12 Car. II. c. 24.(*i*) for abolishing the court of ward and liveries, and for appointing guardians by will, &c. a tutor might be assigned to a child unborn, as also to an ideot or lunatic. But this statute gives no power to the father to appoint a guardian to his child, being ideot or lunatic, after he shall be twenty-one years of age.(*k*) Therefore although the father be within that age, yet he may grant the custody of his child, but cannot demise or devise his land in trust for him directly; but he may do it obliquely;(*l*) for by appointing the custody, the land follows as an incident given by the law to attend it.(*m*)

A will or appointment made solely upon this act, need not be proved in the spiritual court; for the appointment being by statute, the temporal courts shall be judges of it, and the words of such appointment may be, "I commit "my children to the power of A. B."—or, "I leave them "in his hands. I leave them to his government, regimen,

(*e*) 1 Ves. jun. 297. 2 P. W. 262.
(*f*) 1 P. W. 702.
(*g*) 1 Vern. 9
(*h*) 4 Brown, 409. (1793)
(*i*) Swin. 212.
(*k*) Sect. 8. 9.
(*l*) Vaugh. 128. 3 Mod. 24.
(*m*) 1 Vent. 207.

"administration, &c."(*n*) Under this appointment, the ecclesiastical court cannot intermeddle with the body.(*o*)

But this guardian takes place of all others, and being made after the model of a socage guardian, and coming in place of the father, hath not a bare authority, but an interest joined with his trust (*p*) as necessary to the performance of it, but not an interest for himself. He can only lease at will, and not for years, for he is himself only tenant at will.(*q*)

A defendant having become impaired in his mind, after the decree, a guardian was appointed for him, by whom he might produce books, &c.(*r*) (1756)

And where the committee was one of the plaintiffs in a suit with the lunatic, the court referred it to the master to appoint a guardian to answer and defend.(*s*)

The court will not appoint a master in chancery committee,(*t*) on the score of public policy. He would probably have to pass his own accounts. Upon the fair influence that the character of one master in matters of account would have upon the mind and judgment of another master, the conclusion must be, that the appointment of them, as receivers and committees, a situation in which third persons are to enter into conflict with them, never could obtain a satisfactory administration of justice.

Though private persons may put them in the character of executors, the property of suitors is not by the judgment of this court to be put into the hands of its officers.

The office of committee of the person is given for the sake not of the committee, but of the lunatic ; and the allowance is to be given for the purpose of attaching him to the lunatic ; therefore where it appeared that the person proposed had engaged to give to another 3-4ths of the sav-

(*n*) Swin. 216.
(*o*) 3 Keb. 834.
(*p*) Vau. 181. 3. 2 P. W. 123.
(*q*) Cro. El. 678. 734. 8 Mod. 312. 4 Burn. Ec. L. 89. et seq.
(*r*) 1 Dickens, 286.
(*s*) Ibid. 187.
(*t*) 6 Ves. 427.(1807)

ings of the profits, it was reason why the court would not appoint him.(*u*)

In the reign of Hen. VIII.,(*x*) Dr. *Pace*, dean of the cathedral church of St. Paul, *London*, becoming a lunatic, was retained in the custody of the archbishop of *Canterbury*, and this was established in the court of wards, since abolished, upon precedents shewn, in preference to the crown.(*y*)

Section II. *The Principle thereof.*

What lord *Hardwicke* said on a different subject well applies to the case of any trustee, and particularly to that of a committee. By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable disobedience; his omission of his duty is his own default, and he must bear such a proportion as is suitable to the loss arising from his particular neglect.—A court of equity can lay hold of every breach of trust, let the person be guilty of it either in a public or private capacity. The tribunals of this kingdom are wisely formed, both of courts of law and equity, and so are the tribunals of most other nations; and for this reason there can be no injury, but there must be a remedy in all or some of them.(*z*)

In general the court of chancery looks upon trusts as honorary, and a burden upon the honour and conscience of the person entrusted; and not undertaken upon mercenary views.(*a*)

Hence it is that no allowance is ever made to them for their trouble; they are supposed to have regard for the lunatic and his family, and are often his relations, or at least friends, who undertake the care upon charitable and affec-

(*u*) Ibid. 428.
(*x*) Dyer.
(*y*) Brydall, 112.
(*z*) 2 Atk. 421.
(*a*) Ibid. 60.

tionate motives; and the nearer is the relationship, so much less is the ground for any such allowance.

His next of kin have no power to consent, for it is the interest of the lunatic which the court regards; and though they may be next of kin at the time, yet he may outlive them, and his personal estate go at his death into other hands.

But if there be great trouble in managing the estates, he may petition for an increase of maintenance, without any report from the master, which will answer the purpose.(*b*)

The comfort and maintenance of the lunatic,(*c*) according to the limits of his income, out of which a liberal allowance is made, is the first concern of the committee, who in this respect may be esteemed the confidential agent of the court; and the imbecility of his charge should work a principle in his mind of extraordinary fidelity in the execution of his trust.

Some have considered him rather as a bailiff than a trustee, who, though entrusted with a considerable confidence, cannot injure the estate as a trustee could, who possesses the fee, and could fraudulently grant it: still there are moral and legal obligations upon him to which he is equally bound to adhere, in the fulfilment of a charge so responsible as this.

For, he cannot change the nature of the estate by converting money into land, or land into money; he cannot apply the produce for any sinister purposes; nor even for necessary repairs without a previous order;(*d*) nor extend any part of the allowance for maintenance to any of the lunatic's family or himself, in preference to the comforts suitable to his condition and former station in life, as far as his fortune will admit; but he will be allowed for maintenance of the lunatic's son:(*e*) and in every transaction the

(*b*) Ambl. 78. 178.
(*c*) 1 Ves. jun. 296. 6 Ibid. 8.
(*d*) 10 Ves. 104. 11 Ves. 398.
(*e*) 1 Vern. 263.

interest of the lunatic is to be his primary consideration, to which all other interests in being, or in expectancy, are to yield.

If any part of the estate is liable to forfeiture, or other peculiar conditions, the committee is bound to protect it against those events; and if he has not power, he is bound to apply for power to the court.

He is chargeable for supine negligence;(*f*) yet the proof must be very strong: if he be robbed, the loss will be allowed in his accounts, on proving it upon his own oath, for he was to keep it but as his own.(*g*)

The power of the committee is very limited; and therefore, when any extra step is desirable, he should make application to the court: such as that of granting leases and raising money, cutting timber, and the like. Otherwise he will be liable to the consequences of any adverse application against him for exceeding his authority;(*h*) and also to the consequences of leading others into a bad title: it being a rule, which the court itself observes in its decrees, from which he is never to depart, not to vary or change the property of a lunatic so as to affect any alteration as to the succession of it.(*i*)

As the committee of the estate is vested only during pleasure, and has no interest, he cannot grant leases nor any ways incumber the estate without a special order of court, where the profits are insufficient for the lunatic's maintenance; and can bring an ejectment and trespass only in the lunatic's name.(*k*)

He cannot take up more money on a mortgage thentofore made by the lunatic while sane;(*l*) nor be allowed for any improvements and buildings ordered by him the

(*f*) 1 Vern. 144.
(*g*) 2 Ch. Ca. 2. 3 Ves. 365. Jones on Bailments. Fon. Eq. 244.
(*h*) 2 Wils. 130. 1 Vern. 262. 2 Atk. 407.
(*i*) Amb. 81.
(*k*) 1 Vern. 262. 2 Wils. 130. 2 Sid. 125. Hob. 215 Hut. 16.
(*l*) 1 Vern. 263.

committee; and the heir will be let into them. But see *contra*, 2 Atk. 414.

The committee cannot present to a vacant benefice; for that right belongs to the great seal, and was asserted by lord *Talbot*.(*m*)

He cannot invest any surplus of the estate in lands, even in the lunatic's name. This, though with good design, is an exceeding of his authority; and were the lunatic insolvent at his death, this surplus should be applied in discharge of his debts; and such lands, thus purchased, would be liable notwithstanding the claims of the heirs at law. It is provided by the statute, that any surplus should be safely kept and delivered to him upon his recovery, or employed for his soul if he die; therefore now it belongs, in that event, to his next of kin, and any lands so purchased, would be decreed to be sold for their use.(*n*)

But the interest of a fund in court(*o*) belonging to the husband, who was in a state of imbecility, was ordered to be paid to the wife for the maintenance of the family.(*p*) (1792.) And in taking the account of a wife's separate estate, she being a lunatic, regard will be had to the extra expence.

Section III. *The Security requisite.*

The court, in order to exercise due vigilance over their agent, require, from the committee or receiver of the estate, the security of two responsible persons, in double the sum at which the amount of his receipts may be computed.(*q*) And it is one of the duties of the attorney general, to whom this part of the matter is referred, to see that they are proper persons, and their recognizance regularly executed and filed with the clerk of the custodies.

(*m*) 1 Woodeson, 409. 3 Gw. B. Abr. 530.
(*n*) 2 Vern. 292.
(*o*) 4 Bro. Ch. Ca. 100.
(*p*) Ibid. 409.
(*q*) 3 P. W. 111.

The amount is settled upon a general state of the lunatic's property, of which an inventory is made out at the time of executing the commission; by which the attorney general sees what the outstanding personal estate and rents of the real estate amount to; and directs the amount of the security accordingly.

The persons, two or more, proposed to him as securities, must be approved by all the parties concerned, and allowed by him to execute the usual bond.

If any difficulty occurs in providing this security, (for though the committee proposed and allowed may be the most upright, yet his connexions may not perhaps be competent to meet so large a sum, as the outstanding estate, when doubled, may require,) it may be prudent to procure some of those who are indebted to the estate, to pay their debts into court, on due notice to all parties. This will perhaps bring the amount within their power.

It seems also reasonable that as the committee proceeds to lessen the outstanding amount, by receiving and paying it into court, or applying it as directed, he and his co-securities should be relieved as to the amount of their bonds: and on some particular circumstances the court will be induced to grant that the bond be delivered up, and fresh securities taken.(*r*) But the trouble and expence of such applications on every occasion when the receipts are diminished, would be a charge upon the estate, not very just or equitable, and are therefore discouraged but on very particular cases.

Even applications to change the security, when greater are offered, are not encouraged; for, though this may have the appearance of benefit to the estate, yet it may be of dangerous consequence: for if the bond were delivered up, and there happen to be a concealment of any part of the estate(*s*) on taking the account, and the lunatic af-

(*r*) 2 Ves. sen. 673. (*s*) 2 Ves. sen. 674.

terwards recover, he could have no remedy for that for the time past; and it is too frequent that those accounts are superficially taken, and it cannot always be otherwise.

In passing his accounts the committee must state what sums he has had in his hands from time to time; and cannot keep money without being liable to interest; and if he make considerable savings, he will be liable for interest thereon, unless any particular circumstances can be shewn that he did not use it; for he ought to have made interest of it.(*t*)

And unless he pass his accounts regularly every year, he will not be entitled to his costs.(*u*)

The king, or the great seal, cannot grant the custody of a lunatic's estate without account; but he may allow as great a salary for maintenance as the income of the estate amounted to.(*x*)

Where the profits were allowed generally to the committee for the maintenance,(*y*) and he gave security accordingly, at the lunatic's death his next akin filed a bill for relief; but the court held that it was the same as if they had granted an allowance equal to the profits. The order was pleaded and directed to stand for an answer, and that unless gross fraud could be proved, no relief could be expected. *Sheldon* v. *Aland*. J. 1731.

The right and interest in the profits, &c. of an ideot's estate, has relation back to the time of the office found, not from his birth: but the office shall relate back to his birth, so as to avoid all mesne acts done by him. But of this hereafter.

Land being held by an ideot, subject to services, or to mortgage, any person may make the tender for him in respect of his absolute disability; and the law, in this case, is grounded upon charity, and so in like cases.(*z*)

(*t*) 1 Ves. jun. 156.
(*u*) Ibid. 296.
(*x*) 3 P. W. 110. 3 Ba. Abr. 530.
(*y*) 3 P. W. 104.
(*z*) Co. Lit. 206. b.

If a committee cannot be procured, a receiver may be appointed, with a salary, upon giving the necessary security as a committee, and the property may continue in the original trustees; it is not material whether he is called committee or receiver.(*a*) If this should become an established rule of practice, it will not be unfrequent for men to refuse to become committee, to whom no compensation for trouble is allowed, but some probable expence in extra costs; and yet use influence enough to be appointed receiver, by which name they are to be allowed a salary or commission, on receiving and paying.

As soon as the committee has passed his accounts, it is his duty to present a petition to the lord chancellor, for leave to pay into court, the balance remaining in his hands. This petition is answered as of course; and an order is drawn up thereon.

All orders, as well as reports, ought to be filed with the clerk of the custodies; those upon which the accountant general is to act, are drawn up by the principal register of the court: and this is procured by taking a duplicate of the order from the secretary of lunatics, one for the register, and the other for the clerk of the custodies: and the master gives a duplicate of his reports for the same purpose, one of which is filed in the report office, and the other with the clerk of the custodies.

Section IV. *The Duties and Power.*

One of the principal duties of the committee of the estate, is to take care of one rule of law, that neither the property nor its succession suffer any change, but to act always under the court's direction, which has sometimes so ordered.(*b*)

(*a*) 10 Ves. 622. (1805). (*b*) Ambl. 80.

Where a purchase was made of real estate with the money of a person two years afterwards found by inquisition to have been a lunatic at the time of the purchase, and it appeared that the finding was carried too far, by his incapacity having arisen from a distemper of apoplexy or palsy; for he should have been found incapable of managing his own affairs; evidence was received by the court, that he lived with his own family after the paralytic disorder, as well as before, and was assisted in the management of his affairs by his only son and his steward, and at the time when the purchase was depending rode out to inspect the intended purchase: the purchase was maintained, as it appeared to have been a reasonable act.

There are many instances of apoplexy turning to paralytic disorders, which may at first affect only the members and organs of the body; and, by degrees, as the weight of the distemper increases, may affect the memory and understanding. This act was done with the concurrence of his whole family, and it would be attended with numerous inconveniences, if, in such circumstances, the court should alter the property; he having one son, who must have been heir to the real estate, if not otherwise disposed of, and entitled to the personal if he died intestate; and the court ought especially to give the turn of the scale in in favour of the heir.(c)

Although the court will not order the personal estate of a lunatic to be turned into real estate, yet there have been applications for leave to lay out part of the personal in repairs and improvements; and the court has allowed it, if the next of kin, who, in case of the lunatic's death at that time would be entitled to his personal estate, do not shew any reason against it: and such an order has been binding upon other persons who were not consenting to the or-

(c) 2 Atk. 413. 1742. Lord Hardwicke.

der at the time it was made, but happened to be the next of kin at the time of his death.(*d*)

Part of lord *Anandale's* property consisted of estates in *Scotland* vested by parliament in lands there, during his minority.(*e*) He became lunatic, after the age of twenty-one years. He was found lunatic in *England;* but there was no process of that sort in *Scotland*, and his steward managed his estate there as before. It was of material importance that all his property should be equally disposed of for his maintenance, and that the savings should be fairly applied; and therefore, to effect this, it was ordered that it should be vested in the purchase of lands in a particular county in *England*, pursuant to his ancestor's will. The act only directed it to be laid out there, during his minority, which had expired.

It was plausible enough, that the same reason arose from his insanity; but, on a very different consideration: the one might continue his whole life; the other several years, which the legislature saw would end by computation of time: the interest of the trust estate ought to overbalance, and therefore the court ordered the trustees to call it in, and the committee to sue in the lunatic's name, and the lunatic to execute a proxy, attested by the committee.

As to the application for money to be raised for his maintenance and personal debts; between the produce of the two estates, the personal, in *Scotland*, at his death, being subject to a different rule of distribution from that in *England;* the trust money being part of the ancestor's estate, and to be laid out in *England*, was to be considered in chancery as an estate in *England*, and the interest from thence, though arising out of an estate in *Scotland*, yet, as it was a mere transitory thing arising on changeable securities, which might and ought to be called in, and

(*d*) Ibid. 414.
(*e*) Ambl. 80. 2 Ves. sen. 381. (1749).

was directed by the will to go as the profits of the land when purchased ought, was necessarily considered as part of his personal estate in *England*, to be so applied. Any other personal property he had in *Scotland* was considered as personal property there.

A proportion of maintenance and debts between the two estates, was therefore ordered.

Three thousand two hundred pounds produce of an heritable estate in *Scotland*, charged with incumbrances, sold under the act abovementioned, was remitted to *England*. The act did not dictate how it should be applied, leaving that to the court of session of *Scotland*, had they found him lunatic. It was therefore ordered to be considered as part of his real estate in *Scotland*, subject to all the incumbrances, and to be applied in discharging them.

In *Grimstone's* case,(*f*) (1772,) the custody of the estate had been granted to the heir at law, and a receiver had been appointed. Mortgages paid out of the savings were directed to be assigned to attend the inheritance. Upon the lunatic's death, the next of kin petitioned for the personal estate, and to have the mortgages considered as personal.

The court declared the trustee, to whom the terms had been assigned, to be deemed a trustee for the next of kin, to the extent of the mortgage and interest, and an account to be taken.

Two points arose:

1. Whether the order was right.

2. If wrong, that the great seal had no jurisdiction to vary it.

As to 1.—In the management of a lunatic's estate, the ruling principle is to do what is for the benefit of the lunatic. To lay it down as a rule, that all the savings out of the real estate shall, in all cases, go to the next of kin, is

(*f*) Ambl. 706. cited in 4 Brown, 238.

inverting the principle: the court every day orders the savings to be laid out in repairs, and to discharge incumbrances on the real estate. The case of an infant differs from that of a lunatic, because he can dispose of personal sooner than he can of real estate; and yet, in many cases, the court will order money of an infant, to be laid out in discharging incumbrances, and even in keeping up houses and gardens.(g) It is frequent to order repairs out of rents and profits. If the mortgagee should enter, the rents and profits will be applied to the principal as well as to the interest; and therefore why should not the court order this application?

Lord *Macclesfield*, in *Dormer's* case,(h) ordered 200*l. per annum* to be applied to keep down debts: rents and profits are the fruits of the real estate; they differ very much from other personal estate; and it would be too hard upon the heir to impoverish the rent for the benefit of the personal estate. The case of an infant is different: for an infant has a personal interest to increase the personal fund, which is sooner subject to his disposition than the real estate; and yet even in the case of infants the court will order repairs out of the rents and profits. The first order was established.

2.—As to the jurisdiction, whether the court could vary a former order,

It was said, that acting in matters of lunacy under a special authority, the chancellor had no power over the estate, except by the bond taken from the committee; and when the lunatic is dead and the bond given up, the proceedings must be by bill in chancery.

When a person is found a lunatic, the king alone can grant the custody of him by sign manual; and therefore to save repeated applications, there is always a sign manual to the chancellor on coming into office. This warrant

(g) Amb. 708. (h) 2 P. W. 262.

is a special authority to make the grant, but extends no farther; and the grant being made, the chancellor then acts, not under the warrant, but as keeper of the king's conscience in the exercise of this branch of prerogative. If the warrant was granted to any officer of state, it would not enable that officer to act after the grant made, but merely to direct the grant: all appeals, and every exercise of prerogative, must be to the king in council. Neither reason nor precedent warrant the position, that the jurisdiction ceases with the death of the lunatic; as in 3 Atk. 308.—It is a principle not only as to lunatics but infants, that no part of their property during their incapacity, can be changed to the prejudice of the successor: it would not only be of prejudice to legal representatives, but in case of a will made before the lunacy, which is not revoked thereby, if the personal estate should, during the lunacy, be diminished, the legatees and even the creditors might suffer. See the preceding case of lord *Anandale*, also *Degge's* case, 4 *Brown* 236. n. where the fine and charges of renewal of a freehold church lease for three lives, was paid by the committee, and allowed in his account of the personal estate by order, and the interest in the new lease ordered to be personal estate if he should die in his lunacy.

Where the court had thought fit to order at the instigation of the next of kin and committee to cut timber, the produce was invested in the funds, and the question was, whether it was real or personal.(*i*) The heir at law claimed this produce by the same right as if the timber had been standing; as in *Grimstone's* case, and *Tullit's* case; (*k*) and where cut by order of court, this claim was substantiated by lord *Hardwicke*, in lord *Anandale's* case.(*l*) In *Bevan's* case, lord *Apsley*(1771) ordered the produce to satisfy specialty debts.

(*i*) 2 Brown, 510. Bromfield's case. (*l*) 2 Ves. 381.
(*k*) Amb. 370.

Where timber is cut without order, the property never changes; if cut by order, there is no reason for changing it on that account; unless a special order be made on circumstances; and all the cases do not shew what was done with the produce.

For the next of kin it was contended, that wherever it had been done by order, the produce had gone to the personal estate; but admitted that the court can by decree change the property, where it would be for the benefit of the lunatic(*m*). In the cases of *Grimstone*, *Clarke*, and *Shelly*, the produce of timber went to the next of kin, by order, or in the residue.

In reply—No case decreed that the produce does not continue in the nature of timber. The lands by the statute are to be kept without waste, and in no wise to be alienated: the committee is a mere bailiff, and by 2 Vern. 92. personal laid out in land is to be considered personal, and go to the next of kin, in case of intestacy, and to executors if a will were made during sanity. It is different respecting infants and lunatics; as to infants, the crown is the general guardian—but with respect to lunatics, it is a special authority: the case of the lunatic is therefore stronger than that of an infant, against altering the nature of the estate.

Lord *Thurlow*—According to the argument, the court can on no account apply the timber to the personal use of the lunatic, so that it cannot apply it to the payment of debts, or even to preserve him from a jail, and this because the statute has said that their lands shall be kept "without waste or destruction, and shall in no wise be aliened."(*n*) It is said that a lunatic is reduced to the situation of a tenant for life. I cannot assimilate in my mind, the situation of a lunatic with a mere tenant for life: the statute

(*m*) 2 Atk. 407. 412. Gilb. 10. (*n*) 3 Brown, 514. 1792.

must be construed to mean that the lands shall be kept without destruction, in the same manner as the owner of them would keep them if he were of sound mind: if this be the true construction of the statute, I cannot distinguish between the case of a lunatic and an infant.

It is extremely clear, that at the death of the lunatic, this money was part of his personal property: it would have been considered as such upon a plea of *plene administravit*—it would have been so for the purpose of paying his debts:—it seems difficult to say how the heir at law can claim it against his personal representative. I doubt whether he can have any equity to recall it out of his hands; he cannot do so on any ground but upon some equity arising from its having been improperly converted into personalty; and probably if a committee had wantonly and of his own head so converted it, the court might have thought *that* such a fraudulent management and breach of confidence reposed in him, of the lunatic's property, as to raise an equity for the heir at law. Where a stranger cut timber of a lunatic, the court thought, as there was no breach of confidence, it was like the case of a windfall, and that no equity arose to the heir at law. I think it impossible to say, that where the court has, for good and substantial reasons, thought proper to change the nature of the property, I have no conception that in such a case any equity can arise to the heir at law. It is perfectly indifferent which way it falls, and therefore he can have no equity to recall it from the personal representative. The court have thought proper to change the property, and they have done so, on reasons which exclude all hardships from the case of the heir; at the same time, I think that the court ought to act with great care, and only in urgent occasions. Left undecided.(*o*) The register's note is, that the timber having been cut down by order of

(*o*) 3 Bro. 515.

court, and for convenience of the lunatic, it was severed and and became personal estate; and dismissed the petition: recommending a bill.(*p*)

The question here left undecided was afterwards, in 1793, more fully argued, upon a bill filed after the death of the lunatic, by his heir at law, sir *Henry Oxenden*, against lord *Compton*, his personal representatives: on which lord chancellor *Loughborough* gave judgment in favour of the next of kin, that the produce of timber, felled on a lunatic's estate by the committee under an order of court, is personal estate.

The question of changing the property was fully considered in the judgment then given for a new trial(*q*)—there being no equity.—1793.

The committee may exercise the same power in regard to cutting timber for repairs, as any discreet person who was the owner of it might do; and therefore, where money had been laid out from the personal estate in the purchase of timber to repair barns on the real estate, it was ordered to be made good;(*r*) for it appeared, that this had been done merely with regard to the committee's own interest in the reversion, while there was on the estate timber proper for the purpose.

If timber be cut on the lunatic's estate, whether by order of court or by the committee, and afterwards approved by the court, the rule has been not to change the property if any surplus remain, but to pay it to the heir at law. The principle of all the cases is, that where the property of the lunatic is concerned, the court will not permit a wanton change of the circumstances of that property to change the rights of his representatives after his death; but the court will support the committee in doing it, where it is manifestly for the lunatic's benefit.

(*p*) 2 Dickens, 762.
(*q*) 4 Bro. 231. 2 Ves. jun. 71.
(*r*) 2 Atk. 497. Ex parte Ludlow. 3 Bro. Ch. Ca. 510. (1792.) Ex parte Bromfield.

The general rule is, that the estate of the lunatic is not to be altered, with this qualification, that, that rule must be properly understood that the real principle in managing a lunatic's estate is to do what is for his benefit; that if in all cases, all the savings of the real should go to the next of kin, it would invert the principle that the court every day lays down, that those savings should be invested in repairs, and in discharging incumbrances on the real estate :—and if it were necessary to increase his allowance, the court would cut down timber not decaying, if it would render his state more comfortable.

The statute *de prærogativa regis* directs that the property shall be kept without waste, and the residue beyond maintenance shall be kept for the use of the lunatic, and be delivered to him when of right mind, so that it shall in no wise be aliened, &c.(*s*) It is not possible to assimilate the case of a lunatic, tenant in fee, to that of tenant for life, impeachable for waste; for the latter has no property in the timber at all; and therefore, waste by him, has a different construction from that waste mentioned in this statute, which only means without destruction, and does not hinder the committee, under the authority of the king, from making use of those opportunities which the property of the lunatic would enable him, if in possession of his senses, to make use of, to deliver himself personally from any pressing urgency.

It is said in *Grimstone's* case, that the court has more power over the personal, than the real property of lunatics; and that the authority of the court does not go to touch any part of the inheritance, or to diminish it, because it is to be kept without waste or alienation. It is clear in estimation of law, that at the death of the lunatic this money is part of his personal property.

(*s*) 17 Ed. II. c. 9, 10.

Where a committee, or guardian, has abused his trust, with a view of changing the quality of the estate, to serve his own interest, there arises an equity to undo the tortious act; but there is no rule of equity upon a less ground than that. Perhaps the court, where guardians or committees have, without order, taken upon themselves to change the property, will, particularly where there is a cause in court, consider it as a matter of fraudulent management, for that is the ground upon which the court must proceed. If it be cut down tortiously, it would be like the case of windfalls, and ought not to be restored by equity.

Considering it so, it is impossible where the court, taking those precautions it always does, and ought to take, not to do it idly or unnecessarily, but for the benefit of the lunatic or infant, thinks proper to cut timber, and convert it, to conceive an equity to change the condition of that when become personal, and to replace it for the heir; for it is truly said, that being done for the benefit of the infant, it becomes indifferent whether it is for the benefit of the heir, or personal representative afterwards; and it cannot be recalled in either case: and as the cases are quoted, particularly that before lord *Bathurst*, they have gone upon that idea, that where it is found to contribute to the interest of the party to make the change, that has been thought such a good reason for it, as to exclude all considerations of hardship, or an equity between representatives.(*t*) Lord *Thurlow*.

The same doctrine was recognized in the following year; (*u*) and as the reasoning was equally important, I cannot refrain inserting it also at length.

There is no equity between real and personal representatives;(*x*) each must take what they find at the decease of the person entitled for life; in the condition in which

(*t*) 1 Ves. jun. 462.—1792.
(*u*) 1793.
(*x*) Oxenden and Compton, 2 Ves. jun. 71. 4 Brown, 231.

they find it. The heir at law cannot be entitled to the produce of decaying timber, against the personal representative, for in that case he would receive a profit he never would have received, if the estate had continued untouched: besides, that in all probability he is, as possessor of the real, in possession of a benefit, in consequence of cutting the timber, by the improvement made thereby in what was left; for it might be annually deteriorating, and the growing timber lessening in value, so that the estate, but for this, would have been in a much worse condition, and the value of the timber would have been annihilated.

The stat. *de prer regis*(*y*) does not commit the care of a lunatic's estate to the court of chancery, but to the crown; (*z*) it is not introductive of any new right of the crown; the better opinion inclines that way, and the words of the statute put it past all doubt; its object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of ideots. The words "waste and destruction" are to be understood in the ordinary, not in the technical sense of waste: there are cases in which to cut timber upon the estate of a lunatic would be no waste; where it makes part of the rental, not merely where it is necessary for his sustenance; but if it is part of the general rental, there is no doubt that it is the duty of the administrator to continue the usual management of the estate, and that which is suited to its circumstances. Where there are valuable woods of full-grown timber, fit for the navy, part of which the owner had been accustomed to cut, it would be a breach of duty in those who would have the administration of it, in case of lunacy, not to manage it in the same manner in which it had been managed before, and as he would have man-

(*y*) 7 Ed. II. c. 10. (*z*) Amb. 707.

aged it himself, if capable. Thus the case of lunacy differs from that of a tenant for life, where this could not be done in any ordinary course of disposition.

The course of the statute has been, that the king has committed this care to a certain great officer of the crown, not of necessity the person who has custody of the great seal, though it generally attends him, by warrant under the sign manual, which confers no jurisdiction, but only a power of administration, from whom an appeal lies to the king in council (*a*)

The general object of attention of the managers, is solely the interest of the lunatic himself; and with regard to the management of the estate, solely the interest of the owner, without looking to the interests of those who, upon his death, may have eventual rights of succession; and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors.

There will always be an emulation of each other; and their speculations, if the administrator was to engage in them, would mislead his attention, and confine his observation as to the interest of the only person he is bound to take care of. The next of kin would contend for a short allowance; the heir would have no interest to contend for a small allowance out of the rents and profits, but might have an emulation against the next of kin, and therefore when the next of kin would contend for a small allowance, the heir would insist on a large one: Therefore the court have always shut out of their view all consideration of eventful interests, and considered only the immediate interest of the person under their care; there would else be a constant running account between the personal and real estate.

(*a*) 3 P. W. 108.

There are many cases wherein it is necessary to apply personal to purposes relating to real estate; as in repairs, &c. If it were necessary for the real to bring an action of trespass, which might run into great expence, if that was not to be paid out of the personal, a great injury might be sustained; and there is no instance of a charge in a receiver's accounts of what has been expended upon one estate, in order to charge it for the other.

If the chancellor was constantly looking to the right and left, and weighing the probable interests of the representatives, the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events; therefore he is to administer the estate *tanquam bonus paterfamilias*, making any advantage fairly to increase and improve it, without engaging in risks and dangerous adventures, for those are not fit enterprises.

But whatever tends towards ordinary improvement, it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate: but care must be taken that nothing extraordinary is to be attempted, or estate to be bought or interests to be disposed of. Any alteration of property is as far as possible to be avoided, consistently with the idea of preserving the interest of the proprietor: payment of debts is so much for his interest, and such pressing cases might be put, that the chancellor would order the application of personal to any extent, as in *Grimstone's* case.(*b*) Thus it may be for the advantage of the estate, and of the lunatic, to fell timber; the real estate is not detrimented, but ameliorated; and the fund of the personal is increased by something arising out of the real estate, the fair fruit of the real come to maturity, which if not then gathered would be lost.

(*b*) Amb. 706. ante.

It was said upon the reasoning in *Beverley's* case,(*c*) that the power of a committee is like the power of a bailiff: suppose it cannot be raised higher: if a bailiff had cut timber without any authority, which would be very wrong conduct in a bailiff, and before it was converted into money the party die, there could be no doubt it would be personal assets: the heir could have no action against the personal representative: and though the bailiff might be answerable for his misconduct, there is no equity between the representatives upon the subject.(*d*)

But the court alters the property, if the interest of the lunatic requires it.(*e*) Money may be laid out in improvements, in draining, inclosures, renewals attending landed estates, fines of copyholds, for non-payment of which the estate would be forfeited: mortgaged debts of the ancestor, or of the lunatic, are to be discharged without distinction. In all these cases the court makes an election for the lunatic, as he would have done if in his senses.

Thus the rule is settled, that the benefit of the lunatic only is to be considered, not that of representatives; but that what is done with that view must be done with great temper, and not if uncalled for (that must be the qualification) and that neither party can have any foundation of equity to call upon the other to account for what the other has received.

The subject of reference in the case of the marquis of *Anandale*, (1751) before lord *Hardwicke*, was, not whether it would be for the benefit of the lunatic, but of the trust estate, to call in personal property from *Scotland*:(*f*) the interest of the lunatic was then almost a nullity; because, either way, it paid for his maintenance; but the interest which moved, was the difficulty it would be attended with to the successor; and in the result of the case it

(*c*) 4 Co. 123.
(*d*) 2 Ves. jun. 74. 176. 261. 271.
(*e*) 2 Atk. 412.
(*f*) 2 Ves. sen. 381.

was clear that lord *Hardwicke's* determination took a line, to do that which ought to be done with regard to his situation as a lunatic, without any regard to the contingent interests of those who probably would some time or other be his representatives.(*g*)

On the same principle it is determined both at law and in equity, that where there is a confusion of rights, a debtor and creditor in the same person, there is an immediate merger; but it is true in equity, though there may be that, which, if all was reduced to a legal right, would of necessity operate as a merger, a court of equity acting upon the trust, will, on the intent express or implied, preserve them distinct; and that confusion of rights will not take place; as in case of infants entitled to an estate, and to a charge upon it, the rights remain distinct, because more beneficial. But, in cases of lunacy, the representative must take his interest as fortune has directed it, and has no equity to vary it; therefore if a lunatic die entitled to an estate, and also to a charge upon it, it is merged, and the heir takes the estate discharged:(*h*) a trust term having been raised to secure the charge, does not alter the matter, for that remains inert, for the trustees have no discretion, unless required to act for the purposes of the trust.(*i*)

By marriage settlement a sum was to be raised for younger children, and a further sum for them out of a further estate to be purchased:(*k*) the testator died, leaving a son and daughter—the son became lunatic, and the daughter never received either sum, though the estate was purchased; the daughter died unmarried and intestate, leaving the lunatic her brother, and only next of kin: the lunatic died, and his next of kin and heirs were the same persons.

(*g*) 2 Ves. sen. 77.
(*h*) Woodf. Ten. Law, 185. Hob. 215. Hut. 16. 1 Wils. 130.
(*i*) Ibid. 261. 1793.
(*k*) 4 Bro. 397. Ambl. 601, 2 Ves. jun. 261. S. C.

Held—this became a charge upon the lunatic's estate falling in to him as representative of his sister: where there is an union of rights, neither of them can be executed at law, but the court of chancery will preserve them distinct, if the intention so to do is either expressed or implied. Between an absolute, mere real and personal representative, no equity can arise.(*l*)

The bill filed by the representatives of the lunatic and the sister against the committee was dismissed as to both sums.

So a bill was filed by a son, to set aside a settlement made by his father, a lunatic—the court refused to let the house be demised, or the furniture to be sold, and the produce brought into court, as the plaintiff did not consent. (*m*) *Colman* v. *Croker*.

If a legacy be given to put a person into holy orders, and he become lunatic, it may be applied by the committee for his benefit in some other way, as in cases of infants.(*n*)

Coal being found upon the estate, which was charged with mortgage debts, the committee was allowed to work the coal;(*o*) the next of kin had an interest, the heir at law had no interest—it was deemed like cutting timber.

The general rule is, as to application of the property, the committee will not be allowed for any monies expended, without previous order of court, in repairs or improvements;(*p*) though this rule was once relaxed,in a case which appeared fair and reasonable, and lately(1805) where the next of kin undertook to take a part of it upon themselves.(*q*)

The lord chancellor cannot upon petition order part of the real estate to be sold for the payment of debts, in order to prevent the creditors filing a bill. *Ex parte Smith*.(*r*)

(*l*) Woodfall's Ten. Law, 185.
(*m*) 1 Ves. jun. 160.
(*n*) 1 Vern. 255 5 Ves. 463.
(*o*) 6 Ves. 128. (1801.)
(*p*) 11 Ves. 398.
(*q*) 10 Ves. 104. 6 Ib. 799.
(*r*) 5 Ves. jun. 556.

Nor can he make a title by an order to sell leasehold estate for the same purpose; for he cannot make a lease absolute, but only during the lunacy.(s) Lord *Thurlow* refused this for fourteen years together: for the tenant may be ejected by the lunatic if he recover: but he can order the application of personal estate to pay debts, as far as it will go, with rents of the leasehold estate. He cannot direct creditors to take the leasehold estate in execution: but if they will, he cannot restrain them. There is no instance of putting the lunatic in a state of absolute want.

The committee may bring an ejectment, but it must be in the lunatic's name;(t) for the committee being only as bailiff, he cannot make leases of land, or take up money on mortgage.(u)

And where in the service of the declaration, the tenant being a lunatic, and living with C. who transacted all his business, and would not admit access to him; upon an affidavit of this fact, and of having delivered it to C. the court made a rule for the lunatic and C. to shew cause why that should not be good service and that service of the rule on C. should be good also.(x)

The committee cannot grant copyhold estates, but he himself may do so by his steward; the reason is that the committee has no estate in himself.(y)

(s) 8 Ves. 80. (1803).
(t) Hob. 215. Hut. 16. 2 Wils. 130.
(u) 1 Vern. 263.
(x) Sell. Prac. 174. Bar. 190. Woodfall 466.
(y) Leon. 47.

CHAP. VIII.

RECOVERY OF THE LUNATIC.

IN case the lunatic recovers his senses, he must petition the chancellor to supersede the commission:(*a*) upon the hearing of which he should attend in person that he may be inspected by the chancellor: and it is also usual for the physician to attend, or to make an affidavit that he is perfectly recovered.

But where a lunatic moved that he might be examined and make a settlement of his estate, the court sent him to the common pleas to pass a fine, where he would be examined and the issue might be tried.(*b*)

A lunatic is never to be looked upon as irrecoverable; his comfort is to be regarded, and not that of any representatives; and upon this principle hang all the determinations of the courts, respecting the person and estate of the lunatic.(*c*) It affords the most satisfactory reflection, while the mind is sane, to know that if it should ever be visited by this worst of all afflictions, not only the power and authority of the crown itself, but the grave wisdom of the courts of judicature, are immediately open for the protection of his person and property, upon principles of the greatest humanity and caution, to watch over the periods of imbecility, to provide for their necessities, and to render an account when the affliction shall be removed, with as scrupulous an exactness as the most anxious friend could be expected to do, and with as strong a sense of this obligatory duty as the most correct trustee.

(*a*) 1 Fon. Eq. 65.
(*b*) 1 Vern. 155.
(*c*) 2 P. W. 265. 3 P. W. 104.

A party born deaf and dumb, attaining twenty-one years of age, having given sensible answers in writing to written interrogatories, lord *Hardwicke* directed the possession of the real estate and assignment of the personal to the party.(*d*) 1754.

(*d*) 1 Dickens, 268.

CHAP. IX

DEATH OF THE LUNATIC.

IF an ideot or lunatic die before office found, the power ceases, and no inquisition can be taken; for the commissioners are to judge and report the lunacy upon inspection, and the king can take no interest after his death, for his property vests in others.(*a*)

But if an ideot die after office found, which vests the king, he seizes the lands, because he must render them to the heirs.(*b*)

If a lunatic die, the order of reference to the master does not abate;(*c*) and any party may prosecute it and take out his report; and the chancellor may make out an order thereon.(*d*)

If the proceedings under the commission were to abate by death, infinite would be the inconvenience, besides injury to the survivors: the whole must be concluded, and the court will shew the most careful attention that every part of this important trust, executed under its direction, shall have been conducted with fidelity, as well to the parties entitled to the reversion, as to the unhappy object of its care during his life-time.

Upon his decease the heirs at law and next of kin must file their bill to have the property transferred, the report in the matter of lunacy not being of sufficient authority whereon to ground a decree;(*e*) for the lord chancellor acts as a commissioner under a signet, to take care of lunatics, and it is not of necessity that the great seal has that appointment; it was once granted to a lord high treasur-

(*a*) 4 Co. 128.
(*b*) Stam. Pr. Reg. c. 9. f. 34.
(*c*) 3 Bro. 238.
(*d*) Ambl. 706.
(*e*) 2 Dickens, 553.

er—it could not consequently be considered as a *res judicata*. Upon the hearing of this bill, the master will be decreed to enquire who are the next of kin and heirs at law, to advertise in the Gazette, and other papers, for them to come in and prove their affinity in time, and to make his report. (1779).

CHAP. X.

COSTS.

NO costs are allowed to relations of a lunatic for their attendance before the master, to check the accounts; although notice is always given to them for that purpose.(*a*)

Solicitors employed in commissions of lunacy have a lien for their costs out of the fund of the lunatic's estate;(*b*) without being obliged to come under a commission of bankrupt against the heir who took out the commission of lunacy, committees have a lien, and the courts have extended this lien, by ordering the solicitor to stand in the place of the committee.(*c*)

Costs were given against a grantee of a deed, fraudulently obtained of a weak man, not lunatic, and against the solicitor, who prepared it.(*d*)

Courts of equity have always exercised a discretion in giving costs—not upon any authority founded on arguments drawn from cases at common law, and the old acts St. Marlb. 52. Hen. III. &c. but from conscience and *arbitrio boni viri* as to the statute on one side or other, on account of vexation, &c.(*e*)

Where the persons having the custody of the lunatic do not produce him upon an order obtained, the court will decree costs against them.(*f*)

It may not be unseasonable to suggest a proper vigilance against the prevailing practice of allowing very high costs in these cases; as soon as fair compensation is made for needful disbursements and skilful attention, every care

(*a*) 2 Ves. 25. Pr. Reg. 152.
(*b*) 2 Ves. sen. 407.
(*c*) Amb. 103, 1750.
(*d*) 3 Atk. 327.
(*e*) 3 Atk. 552.
(*f*) 2 Ves. 405.

should be taken to avoid the increased aggravation to a family, already distressed by such a visitation as lunacy, of diminishing their resources of comfort.

Costs were given against a stranger for an hasty traverse of an inquisition.(g)

(g) 6 Ves. 580.

CHAP. XI.

DISABILITIES INCURRED.

THERE is a general disability to perform legal acts incidental to the unhappy situation of an ideot or lunatic; their incapacity is obvious; but it is necessary the effects of it in many cases should be considered as they have occurred in the administration of justice.

I have endeavoured to compress them under the following heads:

1. Attornment.
2. Presentation.
3. Marriage.
4. Copyholds.
5. Testimony.
6. Actions and Suits.
7. Wills.
8. Trusteeships.
9. Contracts by Deeds, &c. *per pais*.
10. Fines and Recoveries.

SECT. I. *Attornment.*

A man deaf and dumb, and yet having understanding, may attorn by signs;(*a*) but one that is *non compos* cannot attorn, for he has no understanding, and cannot agree to the grant.(*b*)

Re-entry may nevertheless subject one to distress and action of waste, who of himself could not attorn; for if a man, *non compos*, be lessee for years rendering rent, and the lessor eject him, and make a feoffment, and afterwards

(*a*) 26 Ed. III. c. 63.
(*b*) 18 Ed. III. c. 53. Co. Lit. 315. a. 6 Co. 59.

the lessee re-enter, his liability must attach, although he was incapable of an attornment, for the re-entry revests all interests and estates.(c)

Sect. II. *Presentation.*

A lunatic cannot present to a church, nor his committee :(d) for where a lunatic is seized of an advowson, the lord chancellor, by virtue of the general authority delegated to him, presents to the preferment, whatever be its value ; generally, however, giving it to one of the family : —this right, says Mr. *Woodeson*, was asserted by Lord *Talbot*, whose example was followed by his immediate and other successors.(e).

As to a clergyman himself becoming lunatic see *ante*, pa. 17.

Sect. III. *Marriage.*

One of the incapacities established by the English law is want of reason, without a competent share of which, as no other, so neither can the matrimonial contract be valid.(f)

It was formerly adjudged that the issue of an ideot was legitimate, and consequently that his marriage was legitimate ; a strange determination, since consent is absolutely requisite to matrimony, and neither ideots or lunatics are capable of consenting to any thing : and therefore, the civil law judged most sensibly when it made such deprivations of reason, a previous impediment, though not a cause of divorce, if they happened after marriage ; and modern resolutions have adhered to the reason of the civil law, by determining, as in *Morison's* case, before delegates, that the

(c) 6 Co. 69.
(d) 1 Wood. Lect. 409.
(e) 3 Cruise Dig. 31.
(f) 1 Bl. Com. 438. 1 Rol. Abr. 357

marriage of a lunatic, not being in a lucid interval, was absolutely void.(g)

Formerly when such a marriage was maintained, if the lunatic died, his wife was entitled to dower; for his situation worked no forfeiture, and the king had only the custody of the inheritance in case of ideocy, and a power of providing for him and his family in case of lunacy;(h) but, in both cases, the fee and inheritance being in the lunatic, his wife became dowable. But such a claim is now set at rest.(i)

Persons accessary to the contriving the marriage of an ideot or lunatic, who is possessed of property which can alone be presumed to be the inducement to such an union, are acting in contempt, and are liable to an information at the suit of the crown as the general guardian, and those who are assisting are also liable to be committed to prison, or to give good security, to appear and give evidence of the transaction, *Smart* v. *Taylor*. 9 Mod. 98. But such a marriage is not a supersedeas to the commission.(k)

It is not barely the having some part in the transaction relative to such a marriage that constitutes a contempt, but it is the being in some manner parties to the contrivance, to shew that they are in some degree criminal.(l)

Upon a marriage with a feme lunatic, the court of chancery ordered all deeds and securities relating to her fortune, and all her jewels, to be lodged with one of the masters, in order to secure some provision for her if she should survive the husband, and for children if they should have any, and committed him to the fleet prison for the contempt.(m)

But if the marriage is afterwards held good in the spiritual court, as it may be by being consummated in a lucid interval; and, if upon one inspection it appears that she is

(g) Ff. 23. tit. 1. l. 8. T. 2. l. 16.
(h) Co. Lit. 31. a.
(i) Roper's Baron and Feme, 102.
(k) Cha. Prec. 203. 15 Viner, 138-9. Abr. Eq. 278.
(l) Barnard. 407. (1741). 15 Viner, 138-9.
(m) 1 Geo. I. Cha. Prec. 412.

restored to her understanding, the husband shall be discharged, and the commission be vacated.(*n*)

It seems to have been a doctrine of the old law, that if the wife be an ideot, the husband would not be entitled to curtesy: so that if lands descended to a feme covert ideot, who had issue, and the husband have entered before office found,(*o*) the king, by prerogative, and not the husband, by curtesy, would have been entitled: but it is agreed at present, upon principles of sound sense and reason, that an ideot cannot marry,(*p*) she being incapable of consent to any contract; as the act after-mentioned invalidates the marriage, it of course determines any husband's claim. But this cannot apply to any curtesy in lands of a wife becoming insane after marriage.

But as it might be difficult to prove the exact state of the parties' mind at the actual celebration of the nuptials; and, considering that such persons are liable to be surprised into unsuitable marriages, which may be of pernicious consequences, and a great misfortune to their families, the legislature interfered in 1742,(*q*) and enacted that if any person shall be found lunatic by any inquisition by commission, under the great seal, or person under a phrensy, whose person and estate, by virtue of any statute, shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the great seal, or the major part of such trustees, every such marriage shall be null and void.(*r*)

Notwithstanding this statute, it is held in the ecclesiastical court that dumb persons may contract matrimony by signs; and their marriage is lawful and available to all intents.(*s*)

(*n*) Eq. Ca. Abr. 278. Gilb. Eq. 89. Pr. Ch. 212.

(*o*) Co. Lit. 306. Plowd. 263. 2 Bl. Com. 127.

(*p*) Cooper, 59.

(*q*) 15 G. II. c. 30.

(*r*) Until this act, persons contracting matrimony during a lucid interval, were bound, and the marriage was valid. 9 Ves. 607.

(*s*) Swin. Mat. Con. s. 15.

Now, to be within the prohibition of the statute, they must have been declared lunatic by commission :(*t*) and whatever may have been the opinions or adjudications of former times, it needs no trouble of demonstration to shew that persons born deaf and dumb are necessarily ideots, or come within the least shade of lunacy. It may be that these disabilities are also added to the other privations ; but they are rare cases. The skilful exertions of Mr. *Braidwood*, and of the conductors of the schools for the deaf and dumb, have proved that the human mind, although deprived of its two essential organs of knowledge, elicits as much intelligence as in other cases, when the web which envelopes it is removed with a delicate hand.

If a marriage, under the disabilities of insanity, or ideocy, be of no force, it follows that the issue will not be legitimate.

But it has been held in the ecclesiastical court, that though it hinders the contract of matrimony it does not avoid that marriage which is already contracted; that is, previous to the lunacy.(*u*)

Section IV. *Copyholds.*

A lunatic cannot become a copyholder,(*x*) because he cannot render any services, nor depute any other person ; and this incapacity saves him from forfeiture; for having no will, no act can operate to that effect.(*y*)

Section V. *Testimony.*

To determine exactly the credibility of a witness, and the force of evidence, is an important point in every good legislation. Every man of common sense, that is,

(*t*) 2 Burn. Eccl. 395.
(*u*) Just. Jur. Can. l. 2. tit. 12. Arn. Corvinus Jus. Can. l. 2. tit. 13. de Nup. tiis.
(*x*) 1 Cruise. Dig. 317.
(*y*) Co. Cop. 59.

every one whose ideas have some connexion with each other, and whose sensations are conformable to those of other men, may be a witness; there are no spontaneous or superfluous sentiments in the heart of man; they are all the result of impressions on the senses. Where those impressions are so violent as to disturb the common organization of the sensorium, and thus disconnect the usual arrangement of thought and memory, and conception, they must necessarily disqualify the testimony of any witness.(*z*)

Therefore it is that all persons who are examined as witnesses, must be fully possessed of their understanding; (*a*) that is, such an understanding as enables them to retain in memory the events of which they have been witnesses. Hence it is generally laid down, that persons of non-sane memory or wanting understanding, while under the influence of their malady, cannot be admitted as witnesses between other parties; for they do not possess the requisite share of understanding.(*b*)

As to the commission itself, if a witness be produced who is not of competent understanding the adverse party may except against him, and the commissioners ought not to examine him. But if the prosecutors of the commission persist in his examination, the other commissioners must certify the matter to the court, and make affidavit of the irregularity.(*c*)

A commissioner may be a witness, but he must be examined before he qualifies himself.(*d*)

And a person deaf and dumb, if of sense to have intelligence conveyed to him, may be a witness, and give his evidence by signs, through the medium of an interpreter.(*e*)

The next of kin of a lunatic, having no interest in the property; even where the lunatic is intestate, and in the

(*z*) Beccaria, c. 13.
(*a*) Peake Evid. 31.
(*b*) Co. Lit. 6 b. Pul. N. P. 293.
(*c*) Wyatt Pr. Reg. 419.
(*d*) Ibid. 422. 1 Vern. 369.
(*e*) Leach's Crown Ca. 455. Peake 83.

most hopeless state, a moral and physical impossibility, though the law would not so regard it, that he should never recover, even if he was in *articulo mortis*, and the bill was filed that instant, to perpetuate his testimony, the plaintiff could not qualify himself as having any interest in the subject of the suit. Lord *Dursley* v. *Fitzhardinge* (1801). (*f*)

Section VI. *Actions and Suits.*

There was a time when ideots, madmen, and such as were deaf and dumb naturally, were disabled to sue, because they wanted reason and understanding; but at this day they all may sue.(*g*) The suit must be in their own name but it shall be followed by others: they cannot sue or appear by guardian, *prochein ami*, or attorney, but always in person.(*h*)

The statute of *Westminster* 2. c. 15. does not extend to ideots.

Indeed if he be a minor he must sue by guardian: and if adult, an attorney has been allowed.(*i*)

The lunatic ought generally to be party to a suit;(*k*) but this was overruled in a bill filed for relief against a debt assigned by the lunatic without consideration; for this would have been to stultify himself. He may be party to a suit to enforce an agreement, entered into before the lunacy, for there the above objection does not arise:(*l*) it is as needful to make the lunatic party as an infant, where the suit is for his own benefit: but in case of an ideot, it is otherwise, for the former may recover, and is then entitled to have his estate at his own disposal.

The distinction is, that where he may be led to stultify

(*f*) 6 Ves. 260.
(*g*) Bract. l. 5. 420. Brit. 39. Fl. 235. 6. 17.
(*h*) 33 H. VI. 18. F. N. B. 27. G. Co. Lit. 135. b. 2 Inst. 390.
(*i*) 4 Co. 124 b. Palm. 520. 2 Saund.
(*k*) 1 Ch. Ca. 113.
(*l*) Ibid. 153.

himself, there he is not to be a party: in other cases he may be a party.

If a person who is in the condition of a lunatic or ideot,(n) though not found so by inquisition, is made a defendant, the court of chancery, upon proper information of his incapacity, will direct a guardian to be appointed: and if a lunatic be sued, a committee must be assinged to defend the suit.(o)

Informations are sometimes exhibited by the attorney general, on behalf of ideots and lunatics, construing them as under the peculiar protection of the crown; not only to secure their property, but also against their committees for an account.(p)

Lunatics generally sue and answer by their committees.(q)

If he be not named a party in the bill or information, it is commonly good cause for demurrer.

Bills for these purposes were frequently brought by the attorney general in the nature of an information:(r) and it was formerly held that the lunatic should not be a party under the old principle of not stultifying himself:(s) but it has since been held, that he must be a party by his committee to a bill, and not an information, because he may recover, which differs from the case of an ideot.(t) These bills are now established in equity, where it is held that this maxim of law is to be understood of acts done by the lunatic in prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy; but not as to acts done by him in prejudice of himself, for this can have no foundation in reason and natural justice.(u)

If a lunatic and his committee be defendants, and the latter refuse to put in an answer for him, the plaintiff must

(n) Mitf. Eq. pl. 95. 3 P. W. 111.
(o) Vern. 106.
(p) 1 Ch. Ca. 112, 153. 4 Bro. 559. 3 Gw. B. Abr. 542, 2 Dickens, 748.
(q) 1 Dickens, 233. 1 Ch. Ca. 153.
(r) Finch, 135.
(s) Pr. Reg. 232. 1 Eq. Ca. Abr. 279.
(t) 1 Dickens, 378.
(u) 1 Fon. Eq. 60.

proceed against the lunatic, and apply to the great seal to appoint a new committee. 2 Dickens, 490, (1772.)

And though weakness or other imbecility, and drunkenness, may not be sufficient to support a commission of lunacy, yet the courts of law and equity will relieve against acts fraudulently procured in such situations, the cases of which are very numerous: for if a man is deprived of the use of his reason, his act can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature.(*x*)

A dumb man has been ordered to answer a bill, and also interrogatories;(*y*) but one dumb and senseless, so that he cannot instruct his counsel to draw his answer, shall not be put to answer;(*z*) but where a man was deprived of memory by age, and almost *non compos mentis*,(*a*) he was ordered to answer by guardian, the demand in question being of small amount, otherwise the appointment of a committee would have been the most regular practice.

The custody of the land of a copyholder who was a lunatic, was committed by the lord to J. S. and a trespass was done upon the land; and the court ruled that the action should be in the lunatic's name, for there was no interest gained by this commitment, the committee being only as a bailiff, having no interest but for the profit and benefit of the lunatic, and as his servant; and it is contrary to the nature of his authority to have an action in his own name; for the interest, and the estate, and all the power of suits is remaining in the lunatic: and it was ruled that a lunatic shall have a *quare impedit* in his own name. *Cocks* v. *Dawson*.(*b*) The same rule applies as to ejectments, for he cannot grant leases.(*c*)

At common law, ideots, who, for want of legal discre-

(*x*) 1 Fon. Eq. 65.
(*y*) H. Ch. 124.
(*z*) Toth. 140. Carey Rep. 132. Poph. 141. Wyat Pr. Reg. 292.
(*a*) Ibid. 3 P. W. 111.
(*b*) 1 Sid. 125. Hob. 215. Hut. 16.
(*c*) 2 Wils. 130. Woodf. 348.

tion, are incapable of appointing an attorney, must appear in person: but where an ideot appeared by her friend, she assigned for error, that being ideot, she had previously appeared and defended the action by attorney.(*d*)

The courts of common law will not discharge a defendant out of custody on filing common bail on affidavits that he had become insane since the arrest; nor if insane at the time of the arrest: nor will they discharge the bail put in above, if he become insane, and a commission of lunacy be found since the commencement of the action.(*e*)

It is a good defence to an action on a deed that defendant was a lunatic at the time.(*f*) This seems to militate against the rule in *Beverley's* case, that a man shall not be allowed to stultify himself; but, on the subsequent authority of *Smith* v. *Carr* (1728), when chief baron *Pengelly* admitted it; and on considering *Thompson* v. *Leach*,(*g*) the court suffered it to be given in evidence, upon which the plaintiff was nonsuited. But it has since been held (9 Wil. III.) that such bonds are void, because the law has not appointed any act to be done to avoid them, and the only reason why the party cannot plead *non est factum* is, because the cause of nullity is extrinsic, and does not appear on the face of the deed.(*h*)

The old rule that a man shall not be able to stultify himself by pleading insanity to any act, has been since much controverted, and from its great inconveniences much restrained: and such a plea was advised in *Smith* v. *Carr*, and *Thompson* v. *Leach*.(*i*)

These were cases at common law; although the principle on which courts of equity in general relieve, appear to entitle the lunatic to relief, there are no cases in which the plea of *non compos* by himself before inquisition, has been

(*d*) Co. Lit. 135. b 2 Inst. 390. F. N. B. 27. 2 Saund. 335.
(*e*) 2 T. Rep. 390. (1788.) 4 T Rep. 121. (1790.) Tr. 13 G. III 6 T. Rep. 133. 1 Tidd 184.
(*f*) Bull. N. P. 172. Stra. 1104. 4 Co. 123. 1 Tidd. 595.
(*g*) 1 Vern. 198.
(*h*) Salk. 675.
(*i*) Str. 1104. 2 Ventr. 198.

allowed; on the contrary, in *Bonner* v. *Thwaites*, it is said that the chancery will not retain a bill to examine the point of law.(*k*).

A new trial was granted by the court of chancery, where that court had directed an issue, and that the jury should indorse the *postea* at what time the lunatic became so: and they found that the person was not insane at all.(*l*) Although the chief evidence was of lucid intervals, and all agreed that she was habitually insane: and on the second trial a verdict was found accordingly.

In a suit in the ecclesiastical court, by the administrator for a legacy, if the defendant plead a release from the deceased legatee, and the administrator would avoid it by an allegation of lunacy or ideocy; that fact must be tried there, and no prohibition will lie, because that court has a jurisdiction of the original matter: according to the rule *non est consonum rationi, quod cognitio accessorii in curia christianitatis impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere.*(*m*)

In addition to the general jurisdiction of the court of exchequer in matters of equity, a special jurisdiction is conferred upon it by several statutes, such as, *inter alia*, the 29th Geo. II. c. 31. enabling lunatics and others to surrender leases, in order to renew the same.(*n*)

The committee applies by petition or motion in a summary way; and upon hearing all parties, an order is made for his surrender, without levying any fine, and to accept for the lunatic a new lease, similar to the former, as the court shall direct.

The fine advanced by the committee for the new lease, and all incidental charges, are to be paid out of the estate, and are deemed a charge upon the leasehold estate, together with interest, as the court shall direct.

(*k*) Tothill 130. 1 Fon. Eq. 48. Ja. 269, 348. 12 Co. 65. Buls. 211.
(*l*) 3 Bro. 453. (*n*) 1 Fowler, 3.
(*m*) Reg. Orig. 58. 2 Inst. 493. Cro.

The renewed leases are liable to all the same uses and trusts, to which the former leases were invested.

Ideots and lunatics are incapable by themselves of instituting suits in the exchequer.(*o*)

But they appear in their proper names, and put in their answers, and defend by their committees,(*p*) who are appointed guardians for that purpose as a matter of course; and if it happens that an ideot or lunatic has no committee, or the committee has an interest opposite to that of the person whose property is entrusted to his care, an order may be obtained for appointing another person as guardian, for the purpose of defending the suit. So if a person in the condition of an ideot or lunatic, though not found such by inquisition, is made a defendant, the court, upon proper information of his incapacity, will direct a guardian to be appointed.(*q*)

If a bill is brought against a lunatic, stating him to be such, it is a motion of course to apply for a commission to assign him a guardian, and to take his answer by such guardian; but if the bill does not state the defendant to be a lunatic, in that case an affidavit, or other evidence will be required, to shew the defendant's lunacy, before he can be permitted to answer by guardian.(*r*)

The like practice applies with respect to ideots, and to those persons who by age or infirmity are reduced to a second infancy.(*s*)

His answer may be referred for scandal: but it being upon the oath of a guardian, he, and not the lunatic, is liable to pay the costs, or rather the counsel, who signed such an answer.(*t*)

By the statute of limitations, 21 Jac. I. c. 16. persons becoming *non compos* are entitled to bring their actions within as many years after their recovery as others are limited to after the cause of action accrues.(*u*)

(*o*) 1 Fowler 18.
(*p*) Ibid. 211, 332. 410.
(*q*) Mitf. on Plead. 94.
(*r*) 1 Fow. 478.
(*s*) Ibid.
(*t*) Ibid. 465.
(*u*) 1 Tidd 18

Sect. VII. *Wills.*

The law which substitutes a testator in its place, which invests him with the power and character of a real legislature, which grants him the right to change, to discompose, to abrogate, the natural and favourable order of legitimate successions requires at the same time from him both a capacity pro-portionate to the importance of his ministry, and a plentitude, and if we may so express ourselves, of a superabundance of will; and therefore it renders him capable of all kinds of contracts previously to impressing him with capacity necessary for making a testament.(*x*)

Hence it is that incapacity is of more importance in deciding upon the validity of a testament, than merely in determining upon the force and nature of a contract.(*y*)

Ideots not having understanding are deemed incapable of making any will; this doctrine is to be understood of a mad or lunatic person, during the time of his infancy of mind;(*z*) but such an one as hath lucid intervals, clear or calm intermissions, may, during the time of such quietness and freedom of mind make his testament, and it will be valid.(*a*)

The will of an ideot, though it were wise, sensible and reasonable, is nevertheless void; as it seems impossible that it should be so, there is good ground for suspicion that it were not his.

But such an one as is of a mean understanding only, and of the middle sort between a wise man and a fool, unless he be so foolish, simple, and sottish, as to be made easily to believe things impossible, are not prohibited from making a will.(*b*)

(*x*) Evans' Pothier 2. 587.
(*y*) Ibid. 589.
(*z*) 3 Mod. 43. Swin. 8.
(*a*) 34 H. VIII. c. 5. Br. Cust. 50.
Swin. 37. et seq. Co. Lit. 89. Law of Test. 39. 4 Burn. Eccl.
(*b*) Swin. 80.

An old man who is become childish, or so forgetful as not to remember his own name, cannot make a will; so also a drunkard, who, by excessive intoxication, is deprived of the use of reason and understanding, during that time, may not make a will :(*c*) for the qualification of a valid will is a sound and perfect memory ; such a reasonable memory and understanding as shall enable him to dispose of his estate with reason :(*d*) but if his understanding be only obscured, his memory troubled, and not clean spent, he is not incapacitated.(*e*)

One deaf and dumb by nature, has been deemed incapable of making any will; but the observation suggested under the subject of marriage, relative to this disability,(*f*) which is now better understood not to be an affection of mind, may, it is presumed, be sufficient to correct this doctrine; and it has been established, that one who is so by accident, may, by writing or signs, make a will; a person that is so by nature, may make signs also, if ideocy or lunacy be not added to his infirmity.

To make a valid will, it is not sufficient that the testator have memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason : which the law calls sound and perfect memory.(*g*)

And by the civil law these persons are disabled from making wills, because the integrity and perfectness of mind, and not health of body, are requisite qualifications : and these they are admitted to have during lucid intervals.(*h*)

The disqualification of ideocy and lunacy to make any devise, is a common law disability; and what shall be said to be a sane and perfect memory at the time of the devise, is a question to be determined at common law.(*i*)—

(*c*) 2 Co. 6. 23.
(*d*) Swin. 53.
(*e*) Ibid. 83.
(*f*) Ante.
(*g*) 6 Co. 23. Moore 760. Dyer 72. Peake 375. 1 Cha. Rep. 18. Law of Test. 89. 4 Burn. Eccl. 44. 1 Powell on Devises, 146.
(*h*) Swin. 76.
(*i*) 6 Co. 23. b.

It is founded on the actual incapacity of the party to do any act relating to the disposition of his property: it is therefore necessary that every one must be of good and sane memory at the time of disposing of his property.(*k*)

One principal evil meant to be remedied by the framers of the clause in the stat. of frauds, 29 Car. II. c. 3. s. 5. relative to the *attestation* of wills, was the secret and private manner in which wills were executed previous thereto, and the frauds consequential thereupon; with a view to check which, the clause introduced a third ceremony to be observed in the making of wills; namely, that the signing of the instrument should be "attested," &c.

In the application of this word "attested" to the act of executing the will, the legislature has been considered, in the construction of it, as having called the attention of the person attesting to *three* several objects; one of which applies to the testator himself, the other two to the instrument. First, that which relates to the testator, is with regard to his sanity; an attention to which in the witnesses, is a necessary inference, as well from the nature of the transaction, as from the objects of the statute.

The name of the instrument necessarily imports, that there must be a capacity of disposing in the devisor at the time of executing thereof; and that is so essential to its validity, that a formal declaration of his sound and disposing mind is become the introductory clause in such instruments. In the construction of this statute, therefore, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for it was not merely the abstract act or form of signing that the legislature required as *one* necessary solemnity to the constitution of a devise, for an ideot or lunatic might put his name to an instrument, and yet be perfectly ignorant of its con-

(*k*) Cro. Jac. 497. Dyer 148. b.

tents; but the legislature, in the word "*signing*," comprehended another idea, namely, signing an instrument intending it to be a will, consequently the mental power or capacity of willing was necessary, as well as the corporal power of putting the mark or name, to constitute a signing.

The business then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to *try*, *judge* and *determine*, whether the testator is *compos* to sign.(*l*) In equity, therefore, the sanity of the devisor must be proved, which is *one* reason why a will can never be proved as an exhibit, *vivâ voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court, never to establish a will unless all the witnesses attesting are examined; because the heir has a right to a proof of sanity from every one of *them*, whom the statute has placed about his ancestor.

In conformity with this doctrine, it was said by lord *Hardwicke*, in the case of *Wallis* and *Hodgeson*, that it had been determined over and over, that the *devisee* must shew the devisor to have been of sound and disposing mind when a will was to be established as to real estate; proving that it was well executed, according to the statute of frauds and perjuries, was not sufficient.(*m*)

But lord *Hardwicke* added, in the last case, that if they could have produced evidence on the part of the plaintiff, of any act having been done under the will relating to the real estate, he would have dispensed with the rule, being a mere matter of formality. *Sed quære.*

And a will was set aside after forty years possession under it, upon account of the *insanity* of the devisor, although in prejudice of a purchaser.(*n*)

(*l*) Harris v. Ingledew, 3 Will. 93. Camd. Arg. 23.

(*m*) Wallis v. Hodgeson, on Bill of Exceptions, 1 Atk. 56.

(*n*) Squire v. Pershall, 8 Vin. Abr. 169. Pl. 13. Powell on Devises, 68—71.

The *onus probandi* of a testator's lunacy lies on the heir who would invalidate the will ;(*o*) and it is sufficient for the party who pleads the insanity of the testator's mind, to prove that he was in that situation at any time previous to the making his will; although he do not prove this condition at the very time of making it. The reason, says *Swinburn*, is, that it being proved that he was once mad, the law presumes him to continue so, unless the contrary be proved; as it presumes every one to be honest, until the contrary be proved; and being proved, then he which is evil to be evil still: so every man is presumed to have the use of his reason, until the contrary be proved, which being proved, then he is presumed to continue still void of it, unless he were so, for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless he fell into some phrenzy, upon some incidental cause, which is afterwards removed; or unless it be a long time since he was assailed with the malady; for in these cases he is not presumed to continue in his former furor or phrenzy.(*p*)

Yet it is a hard and difficult point to prove a man not to have the use of understanding or reason ;(*q*) and therefore it is not sufficient for a witness to depose that the testator was mad, or beside his wits unless a sufficient reason can be given to prove this deposition: as that he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken.

The sane memory for making a will is not at all times, when the party can speak yea or no, and hath life in him, nor when he can answer to any thing with sense: but he ought to have judgment to discern, or be of perfect memory, otherwise the will is void.(*r*)

(*o*) 6 Cruise Dig. 15.
(*p*) Swin. 78.
(*q*) Ibid. 77.
(*r*) Ibid. 77.

Wills manifestly improper, are not on that account merely to be set aside, as of insanity.(*s*) The giving more to a younger than to an elder son, or any inaccuracy in devising a remainder over, if both sons should die *with* issue, instead of *without* issue, were not evidence on which to say that the testator was *non compos*. *Burr* v. *Davall.*

The superior courts deny prohibition to the ecclesiastical court against granting probate of a will, upon a suggestion of *non compos mentis* of the testator;(*t*) for without probate the executor cannot sue for debts, which might thereby be lost, and the will remain unperformed; and the statute of Henry VIII. never intended to lessen the jurisdiction of the ecclesiastical court.

A bill will not lie to perpetuate the testimony of subscribing witnesses to the will of a person since become a lunatic, and yet living:(*u*) although it could be no prejudice to the testator, nor would it prevent the will from being revoked, if he should recover; but it was no will until death, and this would be to perfect what was no effectual act; had it been maintained, he need not be a party, for nothing was prayed against him.

In the case of Mr. *Greenwood*, who had conceived that his brother intended to have poisoned him; this was the leading source of his infirmity. He afterwards pursued his profession; but this idea was uppermost in his mind; and under that impression he made his will, excluding him from the reversion of his fortune.

Kord *Kenyon*, upon proof of insanity, declared the will invalid, abstracted from the justice of the disherison.

An executor, who takes not any beneficial interest, is a competent witness to prove the sanity of the testator.(*x*)

Persons of these disabilities seldom make wills from the suggestion of their own minds; they are generally impo-

(*s*) 8 Mod. 59.
(*t*) Salk. 552.
(*u*) 1 Vern. 105.
(*x*) Woodf. 493.

sed upon by those amongst whom they have the misfortune to be placed; and therefore the conduct of those around them, as well as the imbecility of their own minds, is generally the subject of inquiry in the courts of justice. But the cases which require the greatest attention, which frequently baffle the understanding of the most acute, and for the proof or decision of which, no certain rules can be laid down, are those of wills made by persons, who, though in sound health and full vigour of body, have the misfortune to labour under that mental derangement, which prevents them forming just and accurate notions concerning the conduct of human affairs. Unlike the ideot, who seems deprived of all reasoning faculties, the madman appears to reason, and unless when the predominant idea, which always possesses these unhappy persons, intervenes, he frequently appears to reason right; in so much, that many instances must have occurred to the experience of all who have been in the habit of attending courts of justice, where persons who have been proved to demonstration, to be utterly deprived of reason, have passed to common and casual observers as people of extraordinary talents and abilities. The reasoning of lord *Thurlow* in the case of *Atty* v. *Parnther*, is very applicable here. See pa. 106 *et seq.*

Many questions have been raised upon the execution of a will during a lucid interval;(*y*) and that being proved, the will has been held valid and effectual, to all intents and purposes, for the conveyance of real and personal estate as if the testator had never been deranged.

If the exact date does not appear, so as to fix it during a lucid interval, yet, unless it express an apparent mixture of wisdom and folly it ought to be accepted for a lawful testament.(*z*)

(*y*) 9 Ves. 610. Swin. pt. 2. s. 3. Orphan's Legacy, pt. 1. c. 8.

(*z*) Vasq. de Success. l. 1. s. 9. Swin. 38.

All proceedings, founded upon a will, which is afterwards disproved for ideocy or lunacy, necessarily fall; and in actions for account, *audita querela* lay for the defendant in such cases.(*a*)

When a will is carried to the ecclesiastical court to be proved by the executor, and any disability attaches to the testator at the time he signed it, tending to impeach its validity, the practice is for a proctor to enter a *caveat*, which prevents the probate passing in the common form: he is then required by the executor to shew what interest he has in the estate; on his shewing this interest, and declaring that he opposes the will, the executor propounds the same, signifying that it will be proved by attesting witnesses, and files an allegation of the *factum* of the will and of the testator's competence at the time of its execution; he then examines his witnesses, which the opposing party may cross examine; and assigns the cause for sentence, which passes, unless the opposing party files his allegation of facts, shewing the incapacity; upon which he proceeds to examine his witnesses, who may in like manner be cross examined by the executor. Neither party see the depositions till publication is decreed; after which either party may set the cause down for hearing, and the validity, or invalidity of the will is then pronounced, and the probate decreed or rejected accordingly.

If an executor become lunatic, the ecclesiastical court grant administration, with the will annexed, to such person as the court of chancery appoint to be committee during the lunacy.

Section VIII. *Trusteeship, and Offices of Trust.*

The natural incapacity of an ideot or lunatic for any office of confidence or trust is obvious; but the inconveniences are manifold where it happens that trustees of lands or

(*a*) Dyer 203.

mortgages for others become unable, even with the direction of the *cestuy que trust*, to execute any conveyance to other persons;(*b*) this was a subject which called for the provision of the legislature ; and to remedy an evil of such great magnitude, it was enacted that such persons, or their committees in their name, by direction of the court, signified by an order made upon the hearing of all parties concerned, on the petition of the persons for whom they were seized in trust, or of the mortgagor, or persons entitled to the monies secured upon any lands whereof such lunatic was seized by mortgage, or of the persons entitled to the redemption, to convey such lands in such manner as the order shall direct; and such conveyance shall be as valid, as if such lunatic were of sane mind, and had executed the same.

And all such lunatic trustees, and mortgagees, or their committees, are compelled to obey such order, by executing such conveyance as trustees of sane memory are compellable to convey, surrender, or assign their trust estates, or mortgages.

It has been held, that the court of chancery has no authority, on petition, to order a trustee, becoming a lunatic, to convey the legal estate ;(*c*) it can only be by bill filed : there may be evidence in the master's office of his being ill ; but there is no reason to denominate him a lunatic : it would be taking, upon affidavits, the cognizance of the state of his mind and legal capacity, which, in courts of justice, is to be established by inquest ; there may be cases where his execution of a deed cannot be obtained, and in that case the execution by a committee may be sufficient but this can only be done by taking out a commission first, and then the court will order the lunatic and his curator to join in the conveyance.(*d*)

The heir of a mortgagee became lunatic, and being resident in *Hamburgh*, was found *non compos* by the proper ju-

(*b*) 4 Geo. II. c. 10.
(*c*) 2 Ves. Jun. 587, 8.
(*d*) Ambl. 80.

risdiction there, and a curator or guardian was appointed there, for managing his affairs.—Held, that the court here was bound to take notice of that, and that he was a mortgagee within this act, and that, on payment of the mortgage debt, he should convey to the mortgagor.(*e*)

But the court will not go into the question, unless a grant of the custody be shewn.(*f*)

It is doubtful whether the words of this statute include all lunatics, as well such as are at large as those of whom custody has been granted by the great seal.(*g*) It may not be great presumption to say, that if this doubt had not been started, the language of the statute would have appeared sufficiently general.—It seems also to be doubted whether it extends to such of whom a curator has been appointed abroad.(*h*)

If a trustee be of unsound mind, though no commission hath issued to find him so, and under an impression of weakness he refuse to transfer stock, under 36 Geo. III. c. 90. the court will order the transfer.(*i*) *Simms* v. *Naylor*, 1798.

This act was made to procure the transfer of stock, and payment of dividends of trustees, absent or becoming bankrupt, or when they cannot all be found; and where the stock stands in the name of any lunatic or committee, who might be absent beyond sea, or die intestate, and it become uncertain whether they be living or dead, the great seal may order the transfer by the accountant general, or secretary of the bank of *England*, to any new committee, or otherwise, and to pay the dividends as the order shall direct; and the bank is indemnified for so doing.

A lunatic resident abroad, under judicial proceedings there, is not held to be within the statute.(*k*)

Under this head it may be observed, that an ideot or

(*e*) 1 Ves. jun. 298. (1749).
(*f*) Ibid. 382.
(*g*) Ambl. 80. 3 Ba. Abr. 541.
(*h*) Ambl. 80.
(*i*) 4 Ves. jun. 360.
(*k*) 8 Ves. 316.

lunatic cannot be an *arbitrator*,(*l*) for he has not judgment to make any award: nor can he be an *attorney or solicitor*, for he has not skill to conduct the affairs of others, having none to conduct his own.(*m*) Neither can he be *essoigner*; but it was held that he may be a steward of copyhold estates, and all his acts, *ex officio*, are held good :(*n*) in this case there seems to be a wise leaning in favour of others, for if a lord should himself be so unwise as to appoint a lunatic to be his steward, it would be a very unfair consequence that all the admissions and surrenders, powers, attornments, relinquishments of dower, &c. taken before him,should be invalid, and therefore involve whole families in confusion: and it is upon the same principle, that if a *Judge*, the highest office of trust under the crown, should become lunatic, all legal acts done before him, would be maintained.(*o*)

Sect. IX. *Contracts, by Deed, &c.*

The faith of every contract rests upon the capacity of the contracting parties; this is a step beyond their fidelity to each other; it is of the essence of the contract not so much that it is valid, as that the parties were in a sufficient capability to bind themselves :(*p*) for, every alienation of a man's right, all contracts between man and man, all leagues between princes, &c. ought to be done with sound judgment; therefore the acts of the will, that are expressed by overt signs, are to be understood as acts of a mind endued with reason, of which a man distracted is wholly deprived, and therefore incapable of performing any profitable things.(*p*)

All promises and contracts are built upon this prin-

(*l*) Abr. Rediv. c. 4. 19.
(*m*) Brit. c. 126.
(*n*) Mir. c. 2. s. 30. Sheph. Guide, 115.
(*o*) Brydall 65.
(*p*) Grot. bel et pa.
(*p*) Brydall 59.

ciple;(q) and so also is the case of oaths, which should never be used but with great deliberation.

One criterion of a valid contract is, that both the contracting parties can have redress against each other; if either party are by incapacity at the time out of the reach of full remedy, it is of natural justice that their contract should be void. A mental derangement operating upon particular subjects, should, with regard to those subjects, be attended with the same effects as a total deprivation of reason; and that, on the other hand, a partial disorder, operating only upon particular subjects, should not, in its legal effects, have an influence more extensive than the subjects to which it applies; and that every question should be reduced to the point, whether the act under consideration proceeded from a mind fully capable, in respect of that act, of exercising a free, sound, and discriminating judgment; but in case the infirmity is established to exist, the tendency of it to direct or fetter the operations of the mind, should be in general regarded as sufficient presumptive evidence, without requiring a direct and positive proof of its actual operation. Where the existence of derangement is shewn in general, the partiality of its operations in the particular instance should be manifestly and incontestibly proved, in order to prevent the application of its general effect.(r)

This suggestion is offered, because the distinction must always be made as to contracts by lunatics, whether they were made in a lucid interval.

The unfortunate malady which affects the persons who are the objects of our present attention, necessarily works that incapacity in them as to invalidate all their contracts, and to favour the interposition of equity and law in annulling and avoiding acts which, if suffered to remain binding, might confirm their own ruin, and that of their families.

(q) Grot. l. 2. (r) Evans' Pothier 2. 28.

This part of our subject is perhaps of the most importance, and has been viewed in various lights by the decisions of the courts, which have distinguished between acts done *in pais*, and those upon record, as fines, &c.

An agreement of a lunatic cannot of course be carried into a specific execution ;(*s*) but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties ; which will be the same as before, provided they can come at the remedy. As if a legal estate is vested in trustees, a court of equity will decree a specific performance, and the act of God will not change the right of the parties ; but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law. *Owen* v. *Davies*.

Although weakness or other imbecility,and drunkenness, may be sufficient to support a commission of lunacy, yet the courts of law and equity relieve against acts fraudulently procured in such situations :(*t*)—for if a man is deprived of the use of his reason, his act can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature : and any conveyance made by a person of weak understanding, though not lunatic may be set aside.(*u*)

Lord *Hardwicke* refused to set aside a contract made by a party who was drunk at the time ; as there did not appear to have been any unfair advantage taken, and the agreement was reasonable in itself.(*x*) But in an earlier case, lord chief justice *Holt* held that a person might shew, in opposition to the validity of a bond, that he was made to sign it when he was so drunk that he did not know what he did.(*y*)

They have, however, been deemed capable of purcha-

(*s*) Sugden 87. 1 Ves. 82.
(*t*) 1 Fon. Eq. 65.
(*u*) 1 Ves. 19.
(*x*) 2 Vern. 189.
(*y*) Bull. N. P. 192.

sing; and although they recover their senses, cannot waive the purchase;(z) and if they then agree to it, their heirs cannot set it aside. If they die during their lunacy or idiocy, then their heirs may avoid their purchase; as the king has the custody of ideots, he may, upon office found, annul it; and after a lunatic is found so by inquisition, his committee may vacate it.(a)

If the contract be just, and the consideration *bona fide*, and part of it paid, the court will order a specific performance of it; and though an agreement be only partly executed, yet if the parties have all acted upon it, this will take it out of the statute of frauds; for it is fraudulent in one party to contract and lead the other on, and then withdraw from his performance.(b)

The mutual consent necessary to constitute the validity of any contract, implies capability in the contracting parties, without which, as the basis of the contract, the agreement becomes void, on principles both of law and justice.(c) Every principle of virtue is founded on this capability, for there can be no account where the rational principle is deranged. Every moral obligation, and every rule of public and private duty is also built on this foundation, and where that is not found, the happiness and welfare of society being in danger of interruption, the human, ceasing to be governed by those ties which unite and govern the social compact, falls to the level of the brute, and being equally, or in some cases more fierce, requires more coercion or confinement; and as in this unfortunate state the mutual obligations of every contract and right of expectation of one side, and the knowledge of that expectation on the other, cannot be accomplished, it becomes impossible that an ideot should enter into any valid contract, or any

(z) Sugden 292.
(a) 2 Bl. Com. 290. 6 Lit. 3. a. Co. Lit. 247.b. 2 Vern. 412. 678. 1 Eq. Ca. Abr. 279.
(b) 1 Ves. 297. 441. 1 Bro. 417. Præ. Cha. 519. 1 Atk. 12. 3 Atk. 4. 1 Vern. 151. 473. 2 Vern. 455.
(c) Puff. L. Na. Grot. Bel. P.

person with him, and that such as have been entered into with lunatics, can only be maintained in lucid intervals.(*d*)

To prevent and relieve, as much as possible, the forlorn situation to which human nature is thus reduced in these afflicting cases, the common law of *England*, sanctioned by its early parliament, has vested in the crown, as a part of its most splendid and dignified ornament, the tender care of those, who, thus born under its allegiance, cannot yield any of the services of subjects, or bring into the common stock any of their personal aid; and as incapable of virtues, can only ask to be forgiven and protected from their vices; and while incapable of industry and activity, to manage and increase their own talent, rely upon the crown for the custody, the safety, and the comfort, of their persons, and the preservation of their property.

Courts of equity will not only sustain contracts completed by a lunatic while sane, but, under circumstances, will enforce performance of such as were entered into before, but were not completed at the time of his lunacy: for the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the right of the other parties.(*e*)

Where the lunacy, alleged at the time of the agreement, was denied, and a sum tendered in the confirmation of the contract, it was, on motion for directions, desired that the receipts might be general, or in pursuance of the order.

And the court said, they might give such receipts as the defendant desired, it could not harm the lunatic, being only the committee's acts: nor should it prejudice them on the hearing.(*f*)

A bill was filed by a lunatic and his committee to set aside a settlement which had been obtained from him before the issuing the commission of lunacy, but subsequent

(*d*) Paley 1 142.
(*e*) 1 Ves. 82.
(*f*) Wyatt, Pr. Reg. 273.

to the time when he was found lunatic; and the bill charged several acts of insanity and distraction, previous to the making of the settlement, and issuing the commission, and that the commission was still in force. To this bill the defendant demurred, for it was against a known maxim of law, that any person should be admitted to stultify himself, &c.

But the court overruled the demurrer, and said, that the rule was to be understood of acts done by the lunatic to the prejudice of others, that he should not be admitted to excuse himself, on pretence of lunacy, but not as to acts done by him to the prejudice of himself: besides here, the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatic: and it has been always holden that the defendant must answer in that case; and so he was ordered to do here, though the settlement was not unreasonable in itself, being only to limit the estate in question to the defendants the uncles, on failure of issue male of the lunatic, with power for the lunatic to charge the same with considerable portions for his three daughters, with a power of revocation. *Ridler* v. *Ridler.*(g)

A lady subject to such a *furor uterinus* as to produce temporary derangement, with lucid intervals, was the legatee of stock for her separate use:(h) her husband received the dividends by a power executed by her. An issue was directed from chancery, whether the lunatic, when she executed the power, was not found so. A new trial was prayed, and lord *Thurlow* said, there is an infinite, nay, almost an insurmountable difficulty in laying down abstract propositions upon a subject, which depends upon such a variety of circumstances as the present must necessarily do: general rules are easily formed, but the application of them creates considerable difficulty in all cases in which

(g) 3 Bac. Abr. 539. 2 Vern. 414. 1 Eq. Ab. 279. pl. 5.

(h) 3 Brown, 443. *Atty* v. *Parnther.*

the rule is not sufficiently comprehensive to meet each circumstance which may enter into, and materially affect, the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently; but this rule goes very little way towards that point which is necessary to the present subject; for though it be true that a mind in possession of itself ought, when acting, to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure, for the purpose of trying the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved or admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement.

The evidence in such case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for, from an act, with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party who had confessedly laboured under a mental derangement was capable of doing acts binding on himself and others.

The argument urged (by the solicitor general), that after the removal of the disease, when the morbid affection no longer obscures or vitiates the judgment, the mind will labour under a languor and debility, which, with reference to its former sound and unaffected state, might render its exertion and decisions very unequal and inferior, carries along with it weight; for I agree that the inferiority of mind would in itself be a degree of evidence to shew that the disorder was not rooted out; the convalescent state would incline to look forward to the removal of the disorder, but would not of itself shew that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched and examined with jealousy: nothing could be more dangerous than to try the state of the mind by individual acts, in those cases, in which the disorder is, as it is most frequently, insanity *quo ad hoc;* at the same time, though partial insanity does frequently prevail, it must be watched always with infinite care, and it seems scarcely possible to extract from any particular case of this kind, that which will apply to any other.

In *Coglan* v. *Coglan*, the judges seem to have thought that there was a clear interval, and this was proved by persons in the habit of watching the patient. Such persons can best prove whether the derangement had entirely ceased, or whether there was a perfect interval. By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture; a mind relieved from excessive pressure; but an interval in which the mind having thrown off the disease, had recovered its general habit.

In *Greenwood* v. *Greenwood*, the question turned upon this; whether a mind sound to general purposes, in the doing of a particular act, being influenced by a false imagination, an unreasonable persuasion was not sufficient to

avoid such act. A question of so great extent involves serious consideration.

The present case, however, is free from all difficulties of that kind, for there is clear and distinct evidence of the party having been, at one period, mentally incompetent. The woman who attended her, was hired to attend, and did attend her, as an insane person; the medical man who attended her, prescribed for her as such. Nor is there any contradiction in the evidence in this case: they who represent her as having talked reasonably, about her property, certainly apprehend that such short effort of her mind made her capable of disposing, and that the disposition to her husband was proper; they did not mean to circumvent a weak mind; but I think they scarcely watched the means with sufficient attention: their characters are not impeached.

It is, however, an agreed point, that she was once undoubtedly insane. But it is said, that this particular disease, *furor uterinus*, ought to be deemed a bodily disease; but if it were, and the effect of it produced this constant habitual derangement of mind, it comes to the same end. The jury, however, would not act upon this; the evidence does not prove it; and the medicines administered were not applicable to such complaint: the jury were to try this question, with reference to the effect of an instrument, revocable in its nature; and therefore the directions, as to the time, were necessary.

Nothing can more circumstantially mark an habitual derangement, than the conduct of the husband with Mr. A————. It is impossible to overlook what was the opinion of the husband; therefore it comes to the question of a person habitually deranged; and whether there was between the paroxysms of the disorder any clear, decided, lucid interval, I think it would be extremely dangerous to all property to say in such a case. The verdict is clearly

wrong in saying, that she was not insane at all, as all the witnesses agree that she was habitually insane; but whether there was a clear lucid interval, is a much nicer question.

Upon a new trial, the jury found for the plaintiff. *Atty* v. *Parnther.*

So likewise it was held, that if one who becomes *non compos mentis* by accident be disseised, and suffer a descent, and afterwards recover his memory and understanding, yet he shall never avoid the descent: and so it is *a fortiori* of one that hath lucid intervals.(*i*)

If an ideot contract for necessaries in house-keeping, he is bound to pay for them.(*k*)

The right and interest in the profits of an ideot's estate, has relation back to the time of the office found, not from his birth :(*l*) but the office shall relate back to his birth in some respect, viz. to *avoid all mesne acts done* by him: for the king has the custody of an ideot, not in respect of any seigniory, but *jure protectionis suæ regiæ*, because his subject is not able to govern himself, nor the lands and tenements which he has; and his protection begins by the office found: and by statute Ed. III. c. 9. the King shall take the profits from the time that he is charged with the finding of the ideot and his family necessaries, and that is after the office found.

If therefore the king should grant, to one that intrudeth upon the possessions, or takes the person unlawfully, that he would not prevent them, such a grant would be void: for these are acts of justice and offices of a king, which he cannot put off, *cessat regnare si non vis judicare;* and in this matter he is never supposed by law ill affected, but abused or deceived; for *eadem presumitur mens regis quæ est juris.*(*m*)

(*i*) Co. Lit. 247.
(*k*) 1 Roll. Abr. 357. 2 Sid. 112.
(*l*) 8 Co. 170. 1 Fon. Eq. 55
(*m*) Hob. 155.

A devise to charitable uses by a lunatic, in not aided by 43 Eliz. c. 136.

Many that have capacity to take, have no ability to enfeoffe—ideots, madmen, deaf and dumb, and blind, from their birth: the testaments of these may be avoided.(*n*) But any one deaf, dumb, and blind, if he hath understanding and sound memory, and express his intention by signs, may enfeoffe.

If lands fall by descent to a man that is *non compos*, during his incapacity, his heir may enter instead of him, for he cannot plead his insanity:(*o*) and if he makes a feoffment, he cannot enter and reclaim by writ *dum non fuit compos mentis*, for he cannot be allowed to stultify himself, but his heir at his death may have such writ, and thereby avoid the deed.(*p*)

If an ideot make a feoffment in fee, he shall, in pleading, never avoid it, by saying that he was an ideot at the time of his feoffment, and so had been from his nativity; but upon an office found for the king, the king shall avoid it for benefit of the ideot.(*q*)

So it is of a *non compos mentis* by accident, and of him who enjoys lucid intervals, if an estate be made during his lunacy: for the parties themselves cannot be received to disable themselves; yet a jury may find the truth.

But if any of them aliene by fine or recovery, this shall not only bind himself but his heirs also.(*r*)

Several opinions were entertained relative to this doctrine of alienation, or other act of a man that is *non compos*.(*s*)

1. That he may avoid his own act by entry or plea.
2. By writ, and not by plea.
3. By writ, or plea, of which opinion was *Fitzherbert*.

(*n*) Co. Lit. 42. b. Brac. 100. 120. Brit. 28. 66. &c. Bria. 88. Fl. 11. 10
(*o*) Co. Lit 24. b. Reg. 228.
(*p*) Ibid. 247. b.
(*q*) Co. Lit. 247. b. F. N. B. 202.
(*r*) Stamf. Pr. 34. F. N. B. 202. n. 4 Co. 124.
(*s*) Co Lit. 247.

4. And *Littleton* is of opinion, that neither by writ nor by plea, nor otherwise, he himself shall avoid it, but his heir (in respect his ancestor was *non compos mentis*) shall avoid it by entry, plea, or writ; and herewith the greatest authorities of our books agree: and was so resolved in *Beverly's* case; but this holdeth only in civil cases.

Although they cannot stultify themselves, yet all contracts with them after office found, are at the peril of those who deal with such persons: and if the commission be superseded or discharged, the lands revert to the lunatic, but this must be at the suit of the committee.(*t*)

A grant of persons out of their right mind, whom we call non-sane memory, or *non compos mentis*, is avoidable; it may be avoided at any time, by entry, action, &c. if they deliver it with their hand, as in a feoffment, and themselves make livery, or a gift of goods, and deliver them in person. But if they deliver it not with their hand as a grant of rent, advowson, &c. or a feoffment by letter of attorney, &c. it is merely void, and nothing passeth; for the power is void, so as they may have a trial or assize, and remain tenant to the lord, and therefore shall be in ward, notwithstanding any feoffment.(*u*)

The mere execution of a deed is absolutely void as against his heir, who may plead the disability, though the lunatic cannot plead it himself.(*x*)

So of a grant made by one that hath no understanding, as if he be born dumb, deaf, and blind:(*y*) but one dumb, or born dumb and deaf, may make a good grant; for divers may have understanding by their sight only, although they be dumb and deaf.

Yet it is said, such grants and surrenders are void *ab initio*, and the heir may maintain trespass against the

(*t*) 3 Ba. Abr. 539.
(*u*) Comb. 468. 2 Vent. 204. 3 Mod. 304. 310. Sho. Par. Ca. 153. 1 L. Ray. 313. 4 Rep. 125. a.
(*x*) Touch. 204.
(*y*) Perk. 5. s. 25. Jenk. 222. Carter 53. Finch. 102-3. Touch. 204.

grantee for distress for a rent charge: but if the distress had been during the life of the grantor, it could not have been avoided.(*z*)

Livery and seisin bar the lord of his escheat; for though it might be avoided by the heir, because he was privy in blood, yet it could not be avoided by one who was only privy in estate.(*a*)

In every good feoffment there must be a good feoffor able to grant; a feoffee able to take; and a thing grantable: therefore, whosoever is disabled by the common law to take, is disabled also to make a testament, gift, grant, or lease; and many also who have capacity to take by such conveyances, have no ability to grant them; as idiots, &c.(*b*)

All grants, gifts, &c. made by deed *in pais* by those who are *non sanæ memoriæ*, are good against themselves; but voidable by their heirs, executors, or those that have their estate.(*c*) But if it be by fine, it is good and unavoidable, for that is done of record, and binds themselves and all under them.(*d*) Of this more hereafter.

But a rent charge, granted by a lunatic, may be avoided by the heir, and held to be discharged.(*e*)

A surrender by *non compos* is likewise void; but the contingent remainder is not destroyed.(*f*) The cases of infants and *non compos* are parallel in all things, except that the latter cannot stultify himself to avoid his grant. The reason why feoffments of infants and *non compos* are *voidable* only proceeds from the solemnity of livery of seisin in the sight of the country, which takes notice of the notorious alteration of the possession; but contra of a deed, which may be delivered in a private manner.

(*z*) Perk. p. 21. 3. Mod. 304. 8 Finch. 102.
(*a*) 4 Cruise, Dig. 20.
(*b*) 4 Com. 291. Cruise, Dig. 20.
(*c*) Co. 123.
(*d*) 1 Inst. 247. 2—483. 5 Rep. 111. 124.
(*e*) Shep. Abr. Tit. Ideot.
(*f*) Carth. 435. 2 Salk. 427. 1 Ld. Ray. 313. Com. 45. Show. 150. 2 Ch. Ca. 103. 2 Vern. 139. Shep. Guide, 118.

The word *dimisit* in the writ *dum*, &c. means only a feoffment with livery by himself, for feoffments and fines were the ancient conveyances, and the only ones used in those days.

It is not for defect of right that a *non compos* cannot avoid his own feoffment; but by reason of his personal incapacity, that no man shall be able to stultify himself.(g) *Thompson* v. *Leach.*

This is founded on the doctrine laid down by lord *Coke:* (h) Every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall, in any plea to be pleaded by him, be received by the law to stultify himself, and disable his own person: because, when he recovers his memory, he cannot know what he did when he was *non compos.*

If the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly the law would have given him remedy for maintenance of himself, his wife, children, and family, although he recovered not his memory, but continued *non compos mentis.*

Those who are privies in blood may shew the disability of their ancestor, and those in representation the infirmity of their testator or intestate; but those who are only privy in estate, or tenure, cannot do it; therefore, if donee in tail, being *non compos*, make a feoffment in fee, and die, without issue, the remainder-man shall not enter or take advantage of the disability of the donee: the same law holds as to the lord by escheat; if his tenant, being *non compos*, makes a feoffment in fee, and die without heir, he shall not avoid it. [But it is otherwise as to fines, of which hereafter.]

The avoiding these acts is founded upon the words of

(g) 1 Ray. 313. Comyn. 45. Carth. 436. (h) 4 Co. 123. 1 Ja. 1.

the statute(*i*), " after the death of such ideots, he shall render it to the right heirs, so that such ideots shall not alien, nor their lives shall be disinherited." The method by which the ideot of full age might avoid them was, if he was found ideot by *a nativitate*, and had aliened his lands by *scire facias* against the alienee, whereby the lands were seized into the king's hands, and the inheritance re-invested in the ideot: for the king could not render them to his right heirs, nor have possession to his own use, unless by the office and seizure such conveyance be destroyed: and that doth not impugn the maxim of the common law: for in this case the ideot, in no plea that he can plead, shall disable or stultify himself; but all this is found by office by the inquisition, and verdict of the king's suit; and such office when found shall have relation to *a tempore nativitatis* to avoid all mesne acts done by the ideot, as feoffments, releases, &c.

Wherefore after office found all gifts made by him, of his goods or chattels, and all bonds, are utterly void: and if he be sued upon any such bond, or writing, the king, by his writ, so long as the office stands in force, reciting the office, shall send a supersedeas to the justices where the suit is commenced.

Although the king cannot have the custody of his copyhold land, that being an estate for life by the common law, and would be of great prejudice to the lord of the manor;(*k*) yet an alienation thereof by the ideot, after office found, is void.(*l*) So alienations, &c. before office found, shall be avoided afterwards, because no laches shall be accounted in the king, nor any prejudice accrue to the ideot for not suing the office before.

But if he die before office found, no office can be found afterwards, and the king cannot be entitled, by the language of the writ.

(*i*) 17 Ed. II. c. 9. (*k*) Hard. 434. Sty. 21. (*l*) Dyer, 30[illegible]

The same principles apply to the case of lunatics, as to alienations; though the king has a different interest; for, as to the ideot, *rex habebit custodiam;* and as to the latter, who may recover, *rex providebit;* and the principle is, that the king may provide, that he who wants reason, shall not aliene his lands, nor waste his goods.(*m*) *Beverley's* case.

The principles in this case have been the guide to subsequent discussions and determinations, and were recognised in *Thompson* v. *Leach*, abovementioned, to render void a deed of surrender, with the distinction already noticed between a feoffment and livery, *propriis manibus*:(*n*) and that which is void, *ab initio*, cannot pass any estate to the surrendree or grantee.

It was argued in *Thompson* v. *Leach*, that the cases of lunatics and infants go hand in hand, and the same reason governs both; their acts are void, because they know not how to govern themselves, and they have a remedial writ to avoid their own intention;(*o*) which would seem to enlarge the determination in *Beverley's* case, where the deed was avoided by any other person than himself.

It seemed to be assumed that when a lunatic recovers, he may, like an infant, consider his acts done during his incapacity, and avoid them by shewing his indisposition by the visitation of God, as well as pleading duress from man, to avoid compulsory acts.(*p*)

But the court determined, that the grants of infants and persons *non compos* are parallel both in law and reason, and there are express authorities that a surrender made by an infant is void, therefore a surrender made by a person *non compos* is likewise void.(*q*) Some have endeavoured to distinguish between a deed which gives only authority to do a thing, and such as conveys an interest by the delivery of the deed itself; that the first is void, and the

(*m*) 4 Co. 123.
(*n*) Car. 435.
(*o*) F. N. B. 202. Reg. 258.
(*p*) 3 Mod. 308.
(*q*) Cro. Car. 502.

other voidable. But the reason is the same to make them both void, only where a feoffment is made by an infant it is voidable because of the solemnity of the conveyance. If *Leach* had made a feoffment in fee, there had still remained in him such a right, which would have supported the remainder in contingency.

The surrender was therefore void, and all persons might take advantage of it; and this decision was affirmed on error in the house of lords.(r) (1690).

The boundary is so narrow and strait between a person who is *non compos*, and one who is so weak as to require the caution of a near relation not to sign any writing or paper whatsoever, that it ought not to overturn the equity of an heir at law, because some of his writings go so far as to give such instances as amounted to ideocy or lunacy. There cannot be a greater instance of weakness than such a caution; it is like a nurse warning a child not to go near the water for fear of being drowned. Besides, in the case of *Sir J. Lee*, it was proved that he was addicted to drinking likewise, which added to his natural debility; that he was almost dark; that one eye was entirely gone, and but a small glimmering of light from the other. They had married him without his so much as knowing he was so, or even without the decency of making a previous proposal to him, which is one of the strongest marks of weakness, and liability to imposition ever met with. His repeating scraps of latin, and reading classic authors, is no proof of sanity, because what a person learns in his youth leaves a lasting impression, and the traces of it are never entirely worn out.

The inquisition had not evidence sufficient to find him lunatic, but the court pronounced him weak upon these circumstances, and a conveyance of his estate, under this unfortunate situation, was deemed the more vulnerable

(r) 3 Mod. 310. Ca. Adj. 150.

from the grantee having such a power over him, that his name only would quiet him: its provisions also were objectionable; it restrained him during life, from taking any fine or leasing without reserving the full rent; and the deed was not to be revoked by him, but in the presence of three particular persons, or their executors or administrators. Thus he was made to disinherit his heir in favour of persons who were no relations; for whom he had never declared any kindness, nor had they merited any at his hands.

A voluntary settlement, and the grantor himself so fettered that he was not able to raise one shilling, and as much confined as if it had been a marriage settlement for a valuable consideration. Had there been no such power of revocation, that would have been almost of itself a reason to have set the deed aside; therefore, for form's sake, one was inserted: but there was no proof that he was acquainted with any of the gentlemen named, or how could he have got them all together, or forced them if they refused? Neither draft nor deed were read to him, but one part was executed, not left with him, how could he remember the revocation? The grantee took it away with him, which amounts to the same as if it had been an absolute conveyance, without any power of revocation at all: besides, it contained reservations of annuities to the attorney, &c.

It is true, if a man be not insane, but only weak, he may do an act which will bind him; there cannot be two rules of judging in law and in equity, upon the point of insanity.

As to the possibility of his having any intention to disinherit his heir, yet if that intention can be traced up to fraud and imposition, this will fetch back and revest it in his heir, with a saving to his creditors. The deed was ordered to be delivered, and the grantee to pay costs. And it was declared, that an attorney or solicitor cannot ex-

cuse himself, by alleging that he only followed instructions, from preparing a fraudulent deed, and therefore he was also directed to pay costs.(*s*) (1741.)

The distinction raised by lord *Coke* in *Whittingham's* case(*t*) between privies in blood and privies in estate, avoiding the acts of their ancestor *non compos*, was denied to be authority in the subsequent case of *Thompson* v. *Leach*, where(*u*) it was said that this distinction was founded upon no manner of authority, but was only his extrajudicial opinion ; for there is no reason to be given why privies in estate should not avoid such acts done by their ancestors, as well as privies in blood, because the incapacity of the ancestor goes to both.

A contract and purchase, at a lucid interval, eight years before the inquisition, when the party was accustomed to buy and sell, was avoided, for the inquisition took a retrospect of seventeen years ;(*x*) but the party had liberty to traverse the inquisition ; but, where it was done before the inquisition, with the approbation of his only son, the court maintained it, but he must be a party, *sed secus* of an ideot. (*y*) There is a difference between a will and a deed obtained from a weak man, and upon misrepresentation or fraud ; this is not a sufficient reason to set aside such a will in equity ; but a deed which is not revocable, as a will, ought to be set aside.(*z*) (1725.)

Where a weak man gives a bond, if there be no fraud or breach of trust in obtaining it, equity will not set it aside only for his weakness, if he be *compos mentis*.(*a*) Neither will the court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity. But a breach of a trust is of itself evidence of the greatest fraud, because

(*s*) 2 Atk. 327. 2 P. W. 205.
(*t*) 8 Co. 42.
(*u*) 3 Mod. 307.
(*x*) 1 Cha. Ca. 113.
(*y*) 2 Atk. 414. 1 Cha. Ca. 153.
(*z*) Ca. Eq. Abr. 406. 2 Vern. 709. 2 P. W. 270. 203.
(*a*) 3 P. W. 130.

a man, however careful otherwise, is apt, to be off his guard when dealing with one in whom he reposes a confidence; and on such ground the court will relieve against such a bond. *Lord Cha. Talbot* 1734.

Thus it appears, in the words of sir *W. Blackstone*,(*b*) that ideots and persons of nonsane memory, &c. are not totally disabled, either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king indeed on behalf of an ideot may avoid his grants or other acts. He then proceeds to trace the progress of the opinion of lord *Coke*, of a man pleading his own disability.(*b*)

In the time of Edward I. *non compos* was a sufficient plea to avoid a man's own bond, and mentions the writ above stated.(*c*) But under Edward III. a scruple began to arise whether a man should be permitted to *blemish* himself by pleading his own insanity;(*d*) and afterwards a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied, on terms as the manner then was, that he was out of his mind when he gave it, the court adjourned the assise; doubting whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it.(*e*)

Under Henry VI. this way of reasoning, (that a man shall not be allowed to disable himself by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument, upon a question whether the heir was barred of his just right of entry by the feoffment of his insane ancestor.(*f*) And from these loose authorities, which *Fitz-*

(*b*) 3 Com. 291.
(*b*) Co. Lit. 247.
(*c*) Brit. c. 28. Co. 66.
(*d*) 5 Ed. III. 70.
(*e*) 35 Assis. pl. 10.
(*f*) 39 H. VI. 42.

herbert does not scruple to reject as being contrary to reason,(g) the maxim that a man shall not stultify himself, hath been handed down as settled law,(h) though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain.(i)

And clearly the next heir or other person interrested, may, after the death of the ideot or lunatic, take advantage of his incapacity and avoid the grant.(k)

And so too, if he purchases under this disability, and does not afterwards, upon recovering his senses, agree to the purchase; his heir may either waive or accept the estate at his option.(l) For these persons are under the protection of the law; which will not suffer them to be imposed upon through the imbecility of their present condition; so that their acts are only binding in case they be afterwards agreed to when such imbecility ceases.

Yet the guardians or committees of lunatics, by statute 11 Geo. III. 20. are empowered to accept of surrenders and to renew in their right, under the directions of the court of the chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatics, their heirs or executors.

The want of this power was frequently detrimental to them and their families, and always prejudicial to the persons entitled to the renewal.

All fines and premiums thereon are, or so much as shall remain unapplied at the lunatic's death, to be considered as real estate, unless the lunatic shall have been tenant for life only, and in that case as personal. Sect. 3.

In like manner where lunatics are interested in or entitled to leases for lives or years, they, or their committees, are empowered under the direction of any court of equity

(g) F. N. B. 202.
(h) Lit. s. 405. Cro. E. 393. 4 Rep. 123. Jenk. 40.
(i) Comb. 469. 3 Mod. 310. 1 Eq. Ca. 279.
(k) Perk. L. 21
(l) Co. Lit. 2

to surrender the same, and take new leases of the same premises, upon the terms of the lease surrendered, or otherwise as the court may direct.(*m*)

And the fine and charges thereon shall be advanced by the committee out of the lunatic's estate, or may be made a charge thereon with interest; and the new lease is to be held upon the same trust as the former.

In a bill filed to avoid a lease, on account of lunacy of the lessor deceased, the attorney general must be a party.(*n*)

The court will not interfere to set aside a contract made fairly and without notice of the purchaser's insanity,(*o*) especially where the finding upon a traverse was general and not precise as to the day of the contract, as in *Fernes'* case;(*p*) where nothing in his conduct excited any suspicion of his situation, but on the contrary he appeared intelligent, understanding the business, and conducting himself with singular propriety. The court's interference must depend upon circumstances, and no general rule can be laid down upon it. With regard to purchases that have not been completed, and cases in which it is possible to replace the parties, there is no reason why the court should not interfere to administer its ordinary equity; as it can do that in general in a much better way than a court of law; even supposing that court would consider the mere law of the case in the same way as this court would. But there may be other cases in which the inconvenience would be so great, that this court will leave the party to law. The inconvenience of carrying back the finding is extremely great, if that is to be followed through all the legal consequences; assuming it to be the legal consequence, that every act of the lunatic subsequent to that time is absolutely void, nothing can be more inconvenient than for this court to give effect to that legal consequence; setting aside

(*m*) 29 G. II. c. 31.
(*n*) Finch 135.
(*o*) 9 Ves. 178.
(*p*) 5 Ves. 832.

every dealing in the course of his trade; giving an account of all he lost; the parties who have dealt with him to take the chance of the transaction, being a losing one and make it good; and the transaction being strictly void, this court acting upon that, and though the parties cannot be replaced, obliging them to refund; though producing the great injustice, that they cannot have that for which the money was paid, or cannot have it in the same manner. That would be most inequitable and unjust, and if this was the principle, must be acted upon in all cases where the lunacy is carried back ten or twelve years.

There is no ground for a court of equity to advance a remedy where it is impossible to exercise the jurisdiction, so as to afford any chance of doing justice to the other party. Where this court does interfere, it endeavours to put the parties in the same situation; that is, where the contract is void. Bill dismissed with costs.—*Grant*, master the rolls. 1804.

All acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and diposing of his affairs at that period:(*q*) this has more frequently occurred upon wills, and they have always been established; it must be the same as to contract, or any disposition of property: if he had made an absolute conveyance, it would have been good, if made in a lucid interval. In the inquiry as to competence, evidence should be found as to his manner of life at the time, the history also of the contract, and the circumstances of the negociation. Something material to the competence may arise or result from the very mode in which the negociation was conducted: but it is for a jury to determine what was the degree of efficiency and competence of his mind at the time.

And, general lunacy being established, the proof is

(*q*) 9 Ves. 610.

thrown upon the party alleging a lucid interval; and must establish, beyond a mere cessation of the violent symptoms, a restoration of mind, sufficient to enable the party soundly to judge of the act: this is an enquiry much more fit for examination, *vivâ voce*, before a jury, than upon written depositions.

If there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit.

These principles were laid down by sir *W. Grant*, master of the rolls, who sat for lord *Edon*, C. (1804) in a case where a bill was filed for a specific performance of a contract, over-reached by a commission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was a lunatic at the execution of it; and if so, whether he had lucid intervals, and whether it was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, viz. that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry with a view to performance, the plaintiff being willing to take the title.

A lunatic, who is lord of a manor, may grant copyhold tenures for any time, according to the custom of his manor, as any other person may do, and the estates made by him are unavoidable.(*g*) Though this was formerly held, it admits of considerable doubt, from the principles since established.

In respect to copyhold estates, every lord of a manor who is in lawful possession, and has a lawful estate in a manor, may make voluntary grants of copyhold lands, which will bind succeeding lords.(*h*) If therefore a lord labours under any personal disability, such as ideocy or lunacy, he may, notwithstanding, make copyhold grants,

(*g*) Shep. 109.
(*h*) Co. Cop. s. 34. 4 Rep. 23. b. 8 Rep. 63. b. Gilb. Ten. 196. Calth, Read. 48, 9. 1 Cruise Dig. 314.

provided they are warranted by the customs of the manor: but he must be in possession at the time of the grant.

And his steward may make voluntary grants, notwithstanding the subsequent disability of the lord, who appointed him.(*i*)

The committee cannot grant, having no estate in the manor, but the steward may, according to its customs.(*k*) Yet the steward may be restrained by order from any such grant, without the privity of the committee, nor until the court have been acquainted with it: this is offered as a caution, as the steward's grant is good in law.

But, notwithstanding all the preceding arguments, great injury frequently happened to persons of unsound minds, and their creditors were delayed in obtaining their demands, for want of sufficient power to apply their property in discharge of their debts and engagements; an act was therefore passed in 1803,(*l*) directing that the great seal being entrusted with the care and commitment of the persons and estates of lunatics in *England* and *Ireland*, shall have power to order their freehold and leasehold estates to be sold, or charged and incumbered by way of mortgage or otherwise, as shall be found most expedient for raising such sums as shall be necessary for payment of their debts, and for performing their contracts or engagements, and the costs attending the same; and to direct the committee to execute such conveyance, and procure such admittance, and make such surrender of copyhold lands, as the great seal shall direct.

S. 2. Any surplus monies to be so raised, are to be applied in the same manner, as the estate sold would have been applied before this act.

S. 3. And all powers of granting leases of lands, vested in the lunatic for a limited estate only, may be executed by the committee, under direction of the court.

(*i*) 1 Cruise Dig. 317.
(*k*) Ley, R. 47.
(*l*) 43 G. 3. c. 75.

S. 4. And, in order to encourage buildings, repairs, or improvements, the great seal may direct the committee of the estate to make such leases of the freehold, copyhold, or leasehold estates, according to his interest, and the nature of the tenures thereof, for such terms and conditions as the great seal shall direct.

S. 5. All such acts done by the committees, by order of the great seal, shall be as valid and binding against the lunatic, and all persons claiming under him, as if he were of sound mind, and had done the same.

S. 6. But this act is not to subject any lunatic's estate to debts or demands of creditors, otherwise than as they are now liable to by due course of law; but only to authorize the great seal to make such orders, when it shall be deemed for the benefit of the lunatic.

Section X. *Fines.*

Notwithstanding the words of the statute of Edward III. are general and emphatical, yet if a lunatic alienes by fine or recovery, it shall bind him:(*m*) for it is held necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record;(*n*) neither the lunatic himself nor his heirs, or executors, can vacate any act of his done in a court of record;(*o*) for it then becomes matter of record which cannot be avoided by a bare averment of *non compos*, from the inconvenience which would ensue; and such averment is against the office and dignity of a judge, who ought not to take any cognizance of a fine, or recognizance of such a person: yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence in the law, the conusor is presumed to be at that time capable of con-

(*m*) Cro. El. 187. 398. Co. Lit. 247. a. 4 Co. 123. 2 Inst. 483.
(*n*) 2 Ba Abr. 197.
(*o*) 4 Co. 124. Bro. Fines 79.

tracting, and therefore the credit of it is not to be contested, nor the record avoided by an averment against the truth of it.(*p*)

So it is in the case of a fine by an ideot, no office finding him ideot *a nativitate* will be sufficient to reverse the fine;(*q*) for that were to lessen the judgment in courts of record, by trying them by other rules than themselves: and this fine will supersede the king's prerogative.(*r*)

And as fines ought not to be taken from lunatics and ideots, so neither from old doating men who have lost the use of their reason; but if they be weak or infirm through age or sickness, that will be no sufficient cause to refuse them:(*s*) ideocy may be judged of by the justices on levying the fine; and if they do admit them, and a fine be levied by such persons, the fine is said to be good and unavoidable.

But a purchase under value by a lunatic was set aside notwithstanding deeds, fines, and recoveries.(*t*)

The same capacity for a deed is required for a fine;(*u*) and any person who hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a conusee therein.(*x*)

But from the doctrine laid down in the preceding pages, which tends to show the deed on which the fine is founded to be in many cases avoidable, it seems difficult to reconcile the distinction between that and the fine and the consequences which will ensue; for if the fine is not avoidable, a fraudulent grantee will be in by the fine but not by the deed; and if the inquisition has relation back to the birth of an ideot, or to any number of years of a lunatic, and therefore avoids his acts, it seems that the judge, at the levying of the fine, and the inquisition of lunacy operate as opposing jurisdictions.

(*p*) 3 Ba. Abr. 197.
(*q*) 4 Co. 126 And 193.
(*r*) Cromp. 117.
(*s*) West Fines. S. 4. 3 Ba. Abr. 197.
(*t*) 2 Vern. 678.
(*u*) Touch. 56.
(*x*) Ibid. 7.

If an ideot or lunatic levy a fine to the king and declare the uses of it, he is bound, that being part of the operation of the fine.(*y*)

However tenacious courts of law have been of the authority of their records, and have even maintained a fine, when duly recorded, acknowledged by an ideot, yet in equity relief has been granted to the remainder-man against a fine, even against a purchaser :(*z*) and though in case of fraud it does not set aside a fine, yet considering those who have taken it under such circumstances as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud ; and though it does not distinctly appear to be the practice in the case of fines levied by idiots and lunatics, yet from the argument in *Day* v. *Hungat*,such may be inferred to be the rule of proceeding.(*a*)

Although a fine duly levied is as effectual and binding in a court of equity as in a court of law, because it is one of the common assurances of the realm, and was originally instituted for the purpose of securing those who were in possession of lands ;(*b*) yet if any fraud or undue practice appears to have been used in obtaining a fine, the court of chancery has then a power of relieving against it, as much as against any other conveyance; for although it might be extremely improper and inconvenient to admit of an averment in a court of common law, against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever; yet as there is a method in which relief may be given in cases of this kind, without contradicting the principles of the common law, it is highly proper that a court of equity should adopt it, and the lord chancellor appears to have exercised this jurisdiction as early as the the reign of queen *Elizabeth*.(*c*)

(*y*) 2 Co. 58. 10 Co. 42. Hob. 224.
(*z*) Tothill 42. 2 Vern. 673.
(*a*) 1 Roll. Rep. 115. 2 Vern. 307. —1Vez. 289. Prec. Cha. 150. Fore Eq. 1. 53.
(*b*) 5 Cruise Dig. 244.
(*c*) Day v. Hungate, 1 Roll. Rep 115. Welby v. Welby, Tothil 99. 13 Vin. Ab. 373.

The court of chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the court of common pleas to get it reversed; but it considers all those who have taken an estate by such a fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a re-conveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their situation. But with respect to any technical error in a fine, or irregularity of the commissioners who have taken the acknowledgment of it, it is a matter only cognizable in the court of common pleas, because a fine, being of the same nature as a judgment, is properly examinable in that court only where it is entered.(*d*)

In what cases *laches* shall prejudice an ideot, or *non compos mentis*, some have taken a difference between a bar of his right and a bar of his entry; for in case of bar of his right, his laches shall not prejudice him but in such special case, if he becomes of unsound memory he shall shew that he was *non compos*. For if he be disseized and the disseisor levy a fine, he is not bound thereby, but may enter; for the *stat. de modo levandi fines* (18 Ewd. I.) which is but a declaration of the common law, bars not only all parties and their heirs, but all other persons of full age out of prison and of good memory, and within the four seas, on the day it was levied, if they do not put in their claim or enter within a year and a day.

So by 4 Hen. VII. c. 24. If a man levies a fine with proclamations, and at the time levied he who had the right was *non compos*, and afterwards recovers his memory, he ought to pursue his action or make his entry within five years after he becomes of sound memory, and in pleading

(*d*) Wright v. Booth, Tothill 101. Vezey 289. St. John v. Turner, 1 Ab. Eq. 259. 1

shew that he was *non compos* at the fine levied and all the special matter: but if he never recover his memory, the heir may have his action or enter when he will, for he is excepted out of the body of the act, and is not bound to make any entry or bring any action within any time, but the party himself if he recovers: and in such case the lord by escheat will take advantage of the *non compos* of his tenant. For if the tenant is disseised and the disseisor levies a fine, the disseisee being then *non compos*, the disseisor takes back an estate to himself in fee, and afterwards the disseisee dies without heir, the lord by escheat shall take advantage of him against his disseisor.

So, if a collateral warranty descends upon one *non compos* which he might have avoided by entry: but an ideot or *non compos* by their laches shall be barred of their entry; and therefore if they are disseised and the disseisor dies seised, it shall toll their entry; but after their death their heir may enter and take advantage of the infirmity of their ancestor, and his laches, which should prejudice himself, shall not prejudice his heir of his entry. For *Littleton* saith, no laches can be adjudged by the law in him who has no discretion in such case.(*e*)

The feoffment spoken of by Lit. 247, means any other conveyance *in pais*; but fines or other assurances of record are not implied in this.

The note in 2 Vern. 678, seems imperfect, as appears by the register's book, of 24th June, 1711.(*f*) It was said that although a person be found lunatic with a retrospect of several years; yet if any conveyances are executed by a lunatic after this time, they shall not be set aside as to good uses; and yet they are looked upon as bad, and the effects and a recovery bad where the uses are bad.

But there was a fine in that case, and therefore the lunatic was bound; as it must be supposed, when he was ex-

(*e*) Lit. 3. (*f*) 3 Atk. 310.

amined, with regard to the fine, that he was capable of levying.

Where the ordinary time limited by St. H. VII. and Ja. I. as to fines is gone by, and the person suing, or his ancestor, was within the exception, the lessor of the plaintiff should be prepared with proof of it.(*g*) The disability should be shewn to have existed at the time when the fine was levied or the title accrued, and to have continued till within the time of limitation,(*h*) for when once the stat. has begun to operate, no subsequent disability will prevent its progres.(*i*)

If a tenant in tail levy a fine, the issue in tail, though a lunatic at the time, is barred forever by it, because he is a privy and out of all the savings of 4 H. VII. c. 24.(*k*)

The act of 23 El. c. 3. does not bar a lunatic or other *non compos mentis* of his writ of error, for reversing a fine so that he or his heirs, pursue such writ within seven years after his incapacity is removed; and if he dies pending the suit, his heir may proceed within one year after the seven years.(*l*)

Ideots, lunatics, and generally all persons of non-sane memory, are incapable of levying fines; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to acknowledge a fine: (*m*) but still, if the judges or commissioners allow them to levy a fine, it can never afterwards be reversed by any averment that the cognizors laboured under any of those disabilities, because the record and judgment of the court being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary: and it is said that even a declaration of the uses of a fine by an ideot or lunatic will be good.(*n*)

(*g*) Peake 311.
(*h*) 6 East. 80.
(*i*) 4 T. Rep. 300.
(*k*) 3 Co. 91.
(*l*) Brydall 98.
(*m*) 5 Cruise Dig. 94.
(*n*) 4 Rep. 124.

One *Henry Bushley*, a monstrous and deformed cripple and ideot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before justice *Southcot*, to one *Bothome*, and had declared the use of the fine to *Bothome* and his heirs.(*o*)

Henry Bushley was afterwards found by inquisition to have been an ideot, *a nativitate*, and upon an action brought by a person who claimed under *Bothome*, the ideot was sent out of the court of wards upon a man's shoulders, to be shown to the judges of the court of common pleas. Lord chief justice *Dyer* said, that the judge who took the fine was not worthy to take another: but notwithstanding this, and although the monstrous deformity and ideocy of *Bushley* was apparent and visible, yet the fine stood good.

It was moved as a doubt in the court of wards, whether this fine should not enure to the use of the ideot and his heirs; for although it was agreed, that the fine, being of record, bound the ideot, yet it was contended, that the deed executed by the ideot, was not sufficient to direct the uses of the fine; but it was resolved, "that for as "much as he was enabled by the fine as to the principal, "he should not be disabled to limit the uses which are "but as accessary."(*p*)

One *Hugh Lewing*, who was an ideot, and so found by office, levied a fine, and declared the uses of it by indenture. It was resolved in the court of wards by the lords chief justices *Wray* and *Dyer*, that both the fine and declaration of uses should stand good, as neither *Hugh Lewing* nor his heirs could aver that he was an ideot: and it was said by the court, that they would sooner suppose the office found to have been erroneous, than bring a judicial act into question, or the judgment of the court in which the fine was levied.(*q*)

(*o*) 12 Rep. 124.
(*p*) 2 Rep. 58 a. Hob. 224. vide infra.
(*q*) Hugh Lewing's case, 10 Rep. 42. Winch 106.

A complaint was made to the court of common pleas, by *Thomas Cust*, supported by many affidavits, setting forth, that *Johanna Lister*, one of the cognizors, in a fine lately levied, had for some years past been disordered in her senses, and was so at the time when the said fine was levied. The court thereupon made a rule to shew cause why the fine should not be vacated, and for *John Hancock*, one of the commissioners, (who, with two others took the fine by *dedimus potestatem*,) to answer the matters in the affidavits. Upon an enlargement of the rule, the court recommended it to them to produce the said *Johanna Lister*, who resided in *Yorkshire*, and accordingly she was brought into court: and being examined by the lord chief justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favour of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its descending to the said *Thomas Cust*, her nephew and heir at law. The court discharged the rule, with costs of the application, and the expenses of the said *Johanna's* journey to *Westminster*, to be paid by *Cust*.(*r*)

Ideots, lunatics, and, generally, all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though, if an ideot or lunatic does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an ideot or lunatic. But if he appears by attorney, I presume such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of ideocy may be tried by a jury, with as much propriety as the fact of infancy.(*s*)

(*r*) Lister v. Lister, Barnes 218. (*s*) 5 Cruise Dig. 397.

Although no averment of ideocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, to invalidate a deed to make a tenant to the *præcipe*, for suffering a common recovery; and the recovery has, in that manner, been set aside.(*t*)

(*t*) Sir B. Wentworth's case, Ibid.

CHAP. XII.

PAROCHIAL SETTLEMENT.

THE settlement of ideots has been formerly compared to that of bastards, and so fixed at the place of birth ;(*a*) but this was over-ruled by lord *Holt*, who held there is no difference between an ideot and any other poor child. The case of a bastard differs, because he has no father, or none that the law looks upon as such; and therefore in 18 Eliz. c. 3. the parish of his birth is bound to maintain him.

The children's settlement during infancy cannot be divided from the father's; where he gains a settlement he gains it for all his family; and if he die and his widow marry, they go with her for nurture, and so follow the settlement of the second husband until they be seven years of age, and then the children return to their own father's settlement.

(*a*) Salk. 427, 485, pl. 43, 528.

CHAP. XIII.

OF VAGRANTS.

THE stat. 17 Geo. II. c. 5. (1744) which empowers magistrates to take care of lunatics, upon complaint of outrages committed, elates to vagrant lunatics only, who are strolling about, and does not extend to persons of rank and condition, whose relations can take care of them properly.(*b*)

Two justices of the peace are authorised by warrant to cause such vagrants to be apprehended and kept safely locked up in some secure place within the county or precinct, and to be there chained, if they find it necessary, if their last legal settlement shall be there;—and if it shall not be there, then to pass them thither, and two justices there may in like manner order them to be confined and chained: and the expenses of their maintenance are to be defrayed out of their goods and chattels to be seized and sold by the justices' warrant to the church wardens or overseers; or by receipt of so much of their rents as may be necessary; and they are to render an account to the next quarter sessions; and if the parties have not property sufficient, then the expenses are to be defrayed by the parish.

This act is provided not to infringe the right of the crown, or the great seal, &c. concerning lunatics, or to prevent any friend or relation from taking them under their own care and protection.

And a recognizance for surety of the peace is not forfeited by confining a person who is mad or even blind, and by such coercion as may be necessary.(*c*)

(*b*) 2 Atk 52.
(*c*) 22 Ass. 56. 2 R. A. 546. 22 Ed. IV. 5. 1 Leach's Haw. P. C. 259. S. 23

There cannot be any doubt that in cases not provided for by this act, any man may seize and bind and imprison a madman, to prevent him doing mischief to himself or to others, or to any property ;(*d*) for the necessity of avoiding greater inconvenience, is a good plea in law ; like that of killing a thief, or burglar, in defence of his person or house.

(*d*) Hob. 96. Moor v. Hussey.

CHAP. XIV.

CRIMINAL ACTS.

SECTION 1. *In general.*

THE disabilities which we have seen to arise out of the incapacity of the unfortunate objects of this work, proceed from the principle of protection which the law affords them;—and this protection is farther extended even where their wild indiscretion has led them to violate the laws themselves. They are forgiven for they know not what they do!—

They ought not to be prosecuted for any crime because they want knowledge to distinguish between good and evil.(*e*)

Ideocy being a defect from birth is generally to be protected from punishment; but lunacy, which is a partial derangement, the senses returning at uncertain intervals, the offender is only protected from punishment for acts done during the prevalence of the disorder;(*f*) for he is then sufficiently punished by his madness, which prevents him from affording by punishment any example to others: (*g*) no guilt, which is the gist of criminal process, can attach to any person while he is incapable of reason or design; and as the evil intention is the implication of every offence, and therefore the charge of every indictment, a deficiency of will is held to excuse the overt act; for there is no human mode of trying the secret motive but by the overt act: if therefore the overt act is proved, it is perfect justice to imply the motive which cannot be proved; for

(*e*) 1 Inst. 247. 3 Inst. 4. 108. Haw P. C. 1.

(*f*) 1 Hale 31. 4 Com. 24.

(*g*) Co. Lit. 247.

confession is not to be the means of conviction, it is the extreme of the doctrine that a man cannot stultify himself.

Any crime committed by an ideot or lunatic can arise only from defective or vitiated understanding; it would be unjust therefore to render him chargeable with his own acts—*furiosus furore solum punitur.*

If a man in his sound memory commits a capital offence, and before his arraignment becomes insane, this will stay the arraignment, because he is unable to plead under proper caution and advice.(*h*)

If after the arraignment and plea he becomes insane, his trial will be stayed, for he is then incapable of making his defence.

If by some oversight, or by means of his gaoler, he plead to the indictment and is put upon his trial, and it then appear to the court that he is insane, the judge in his discretion may discharge the jury of him, and remit him to prison to be tried after his recovery: and this caution is more essentially necessary *in favorem vitæ* where any doubt appears upon the evidence touching the guilt of the fact committed; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact, then upon the same favour of life and liberty,(*i*) it is fit it should be proceeded in at the trial in order to his acquital and enlargement from justice; for by reason of his incapacity, he cannot act *felleo animo.*(*k*)

If it were doubtful, at his trial, whether he were lunatic or not, that question was first tried by an inquest of office to be returned by the sheriff of the county wherein the court sat; and if they found that the party only feigned and still refuse to answer, he was dealt with as one who stood mute.

Every person of the age of discretion is presumed to be of sane memory until the contrary appear, which may be

(*h*) 1 Haw. P. C. 2.
(*i*) Hale's Hist. ch. 35. 36.
(*k*) 3 Bac. Abr. 529.

either by the inspection of the court, and by evidence given to the jury who are charged to try the indictment.(*l*)

Or it being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter* in the nature of an inquest of office ;(*m*) and this method in cases of importance, doubt, and difficulty, the court will in prudence and discretion adopt.

If, after a man be tried and found guilty, he lose his senses before judgment, that shall not be pronounced.(*n*)

If after judgment he becomes insane he shall not be ordered for execution ; for had he been of sound mind he might then have offered something in stay of execution ;(*o*) an argument which also applies to all the former proceedings.

It is therefore an invariable rule when any time intervenes between the attainder and award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him ; and if he appears to be insane, the judge in his discretion may and ought to reprieve him.(*p*)

If the punishment were less than death and were inflicted upon a prisoner deprived of reason, it would be unproductive of one of the great ends of punishment, the correction of the criminal ; and to prevent his doing further mischief to society.(*q*)

Human tribunals are only justified in introducing the pain and evil of punishment when it is likely to prevent that greater degree of evil which would result from the unrestrained commission of crimes. Indeed in the bloody reign of Henry VIII. a statute was made to authorise the trial of a lunatic in his absence, charged with high treason, and to sanction his execution, if convicted, as though he

(*l*) 1 Hale 33. 5. 6. Tr. per pais 14. O. B. 1783-4 3 Ba. Ab. 31.
(*m*) Fost. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72, &c. 1 Hale 35. Sav. 50. 6.
(*n*) 1 And. 154.
(*o*) 1 Hale, P. C. 34.
(*p*) 4 Bl. Com. 395.
(*q*) Beccaria, c. 12.

had his perfect mind;(r) but this act was wisely repealed by 1 & 2 P. & M. c. 10.

But if a lunatic hath lucid intervals he shall answer for what he does in those intervals, as if he had no deficiency:(s) yet this may be avoided by his not being suffered to go at large: it was the doctrine of the ancient law that lunatics might be confined till their recovery, without waiting the forms of a commission or other special authority from the crown;(t) and now by the act for confining vagrants (17 Geo. II. c. 5.) already mentioned this is provided for.

If one who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage.(u)

The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions, which lord *Hale* distinguishes between and calls by the names of total and partial insanity: and though it be difficult to define the indivisible line that divides perfect and partial insanity, yet, he says, it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other side too great an indulgence given to great crimes: and the best measure he can think of is this; such a person, as labouring under melancholy distempers, hath yet ordinarily as great understanding as a child of fourteen years

(r) 33 Hen. VIII. c. 20.
(s) 1 Hale, P. C. 31.
(t) Bro. Abr. Corone 101.
(u) 2 R. Abr. 547. 3 Ba. Ab. 131. B. Cor. 6. Hob. 134. Co. Lit. 247. 289. Plow. 364. 2 Inst. 284. 414. Poph. 141. Brownl. 197. Nov 129. Cro. Ja. 467. 1 Ha. 15. 16. 20. 4 Comm. 22. 2 Comm. 291.

hath, is such a person as may be guilty of felony or treason.(*x*)

Imbecility of the plaintiff is generally no good objection against his bringing an *appeal* of felony, &c. for as the defendant has the proper means for his acquittal, by putting himself upon a trial by his country, and the imbecility of the plaintiff is wholly owing to the act of God, and no way lessens the injury complained of by him, it is not reasonable that he should suffer any disadvantage from it.(*y*) But the total incapacity which attends upon an ideot, or one born deaf and dumb, prevents him from bring ing any appeal whatsoever.(*z*)

So likewise an ideot or person deaf and dumb, or any one that is *non compos* at the time, cannot be an *approver*, to prove his appeal; because no such person ought to be admitted to take the oath before the coroner, without which there can be no approvement; nor can he wage battle.(*a*)

Although the old doctrine seems to have allowed of punishment for inferior crimes, and of damages for civil injuries, committed by lunatics, yet the liberality of modern times would rather waive any such right and relax the pursuit of punishment, or remedy, against an offender who could not have that design which constitutes the criminality.

It is to be assumed that all men are born in a state of sanity; this is the common disposition of nature; reason is the lot of man, it is that which distinguishes him from other animals; a man without reason is little more than an organized body, which only retains the shade and figure of a man: his state is a kind of prodigy and monster in nature: hence arises that common presumption that every man is in a state of sanity; that insanity ought to be prov-

(*x*) Hal. Hist. P. C. 30.
(*y*) 2 Leach's Haw. P. C. 240.
(*z*) Summary 183. S. P. C. 60. 98.
(*a*) 2 Leach. Haw. P. C. 294. 2 Inst. 129. S. P. C. 147. Summary 192.

ed, but that a proof of sanity is not necessary: nothing is more difficult than to prove the fact of insanity; it is not only to combat a natural presumption; it is also to render an invisible and interior quality sensible and visible. It is with this precaution that the plea of insanity can only be set up in excuse for substantiated crime.(*b*)

Section II. *Suicide.*

Upon the principles already laid down, a person who loses his memory by sickness, infirmity, or accident, and kills himself, is not *felo de se*;(*c*) otherwise if he kills himself in a lucid interval.(*d*) So if he give himself a mortal stroke while he is *non compos*, and recover his understanding and then die, he is not *felo de se*;(*e*) for though the death complete the homicide, the act must be that which makes the offence. But it is a vulgar error that none of sane mind can be *felo de se*, and that whosoever kills himself must be *non compos*; for if he be *non compos* as to other acts, that sole act shall not denominate him *non compos*.(*f*)

And here I cannot but take notice of a strange notion which has unaccountably prevailed of late, that every one who kills himself must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and all sense and reason.

If this argument be good, self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued that the murder of a child, or of

(*b*) Evans's Pothier 2. 589.
(*c*) 3 Inst. 54. Hal. Hist. P. C. 412.
(*d*) Ibid. 102.
(*e*) Plowd. Com. 260. Shelly's case. Heydon's case. Brad. L. 3. 2. 2. Fleta. L. 1. c. 36.
(*f*) Comberb. 3. 1 Ja. 2.

a parent, is against nature and reason, and consequently that no man in his senses can commit it? But has a man no use of his reason because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred, and revenge, and such like, are too well known to do in others?

The same mode of reasoning may very easily be extended to excuse the blackest crimes; for nothing can be so contrary to reason and nature, and to all the best interests of life and immortality, as the commission of them.

The decalogue forbids man to commit murder; in which precept self-murder seems no less to be understood, than the murder of another; though the individual has eluded the vengeance of offended justice, yet with a view to discourage the crime, our laws punish a son for having thus lost a father; and a widow because she is thus unhappily deprived of her husband: confiscation of the goods of the deceased, is depriving the survivors of their due.(*g*) By adopting this remark I cannot be charged with defending suicide.

Montesquieu asserts the English destroy themselves often in the very bosom of happiness; that it is the effect of a distemper, connected with the physical state of the machine, and independent of every other cause. The civil laws of some countries may have some reasons for branding suicide with infamy; but in England (upon the principles generally adopted) it cannot be punished without punishing the effects of madness.(*h*)

Section III. *Murder.*

Lunacy is an excuse for murder, for which a madman shall not lose his life, for no punishment of him can be any example.(*i*) So an insane woman by killing her husband

(*g*) Beccaria.
(*h*) Esp. des Lois v. 1. l. 14. ch. 12.
(*i*) Hob. 90. 134. 3 Inst. 6.

cannot commit petit treason, though the same act against the person of the crown was held to be high treason; for the king is *caput et salus reipubs : et a capite bona valetudo transit in omnes.*

Besides, if a madman kill another he hath not broken the law, although he hath broken the words of the law, for he had not any understanding, but mere ignorance, which is the visitation of God.(*k*)

A *feme coverts* notwithstanding ker killing either her husband or another, is nevertheless entitled to dower; the crime not being imputable to her.(*l*)

In the state trials two cases are reported material to this subject.

Edward Arnold was indicted at *Kingston*, before Mr. justice *Tracey*, for maliciously shooting at lord *Onslow*. There was not a doubt that he was deranged, and particularly in relation to lord *Onslow* himself, whose conduct he had very much misconceived. It appeared in evidence, that he had conceived a regular steady design, and had prepared the proper means for carrying it into effect. The court admitted the proofs, but whether the act was done maliciously, &c. was to be deduced from the nature of the insanity on which the jury were to decide : it was laid down that if he knew not what he did then he could not be guilty ; but it was not every kind of partial insanity that would excuse him, but such a deprivation of reason as made a man know no more than a brute, or an infant. This exposition of the law has never since been controverted, but has been adopted in subsequent decisions.

The jury found him guilty, but he was not executed : he was reprieved at lord *Onslow's* request, and remained in prison thirty years.

The case of lord *Ferrers*, before the house of lords, who had killed Mr. *Johnson*, was, that he was occasionally

(*k*) God. Pl. Com. 19. (*l*) Perk. 364, 5.

insane—the murder was deliberate—but he was not punished, for it was proved that he did not know what he did and was incapable, from fits of insanity, of judging of the consequences of his actions. It was urged upon the authorities of *Coke* and *Hale*, that it was not necessary to have a complete possession of reason, but a sufficient degree of it to comprehend the nature of the action,and to discriminate between moral good and evil, to warrant the judgment of the law taking place. He was found guilty, it appearing that at the time he committed the fact he had capacity of mind sufficient to form a design and to know its consequences.

Section IV. *Treason.*

The protection of the person of the monarch has ever been dear to the people of *England;* it has, from the earliest times, and never was more sincerely than at the present day, been surrounded with laws which have been established by universal consent, and with affections accompanying the graver obligations of allegiance and fidelity—the elevated station of the crown as the first estate of the realm, the *caput et salus reipublicæ*, has been guarded by such a rampart as must prove impregnable while the sanity of the people remains unimpaired, and the final visitation of heaven is suspended—the *bona valetudo qnæ transit in omnes* must be lost at its source, and its channels become dry, before its banks can fall in and its barriers be rooted up!

But the charge of the worst of crimes, the murder of the king, must yet be tempered with discretion; the law, though jealous of the least approach to this offence, will spare in its deliberation the condign punishment it deserves, when insanity accompanies the crime: for in our ideas of great crimes there should be nothing arbitrary.(*m*)

(*m*) Beccaria.

In the jealous and violent reign of *Hen.* VIII. even this mild humanity of the *English* law was forgotten; he was resolved to establish himself in absolute power, and to compel his council to aid his designs, in which the parliament were in some acts not inclined to oppose his wish. In one of these we find them yielding to criminal vengeance in the punishment of lunatics for high treason. (1541) (*n*)

It was suggested in the preamble to the statute that lunacy was falsely contrived to delay the punishment; and therefore directed that a special commission should be issued from the chancery upon the certificate of four counsel to enquire of the treason, upon which a jury should be impannelled to try the offence in the lunatic's *absence*, and if found guilty he was to be punished as if of sane memory.

If the lunacy followed the attainder or conviction, punishment was alike to ensue: attainders by common law were declared as effectual as those by parliament; and the king's benefit of uses was saved: saving also the rights of all persons, except those attainted.

But the sounder understanding of the law gave a better protection to the prerogative and person of the crown.

In the subsequent reign the principle of natural justice was declared to be the law of *England*, namely, that a lunatic cannot be punished as an example to others.(*o*)

The ancient law was, that if a madman had killed, or offered to kill the king, it was held for treason, and so it appeared by *Alfred's* law before the conquest, and is recognized in *Beverley's* case;(*p*) but by stat. 25. Edw. III. stat. 5. c. 2. and by force of the words "compassing and imagining the death,"(*q*) he that is *non compos* and totally deprived of all compassings and imaginations cannot commit high treason by compassing or imagining the death of the king; but it must be absolute madness and a total

(*n*) 33 H. VIII. c. 20.
(*o*) Co. Lit. 247.
(*p*) 4 Co. 126.
(*q*) 3 Inst. 6. b.

deprivation of memory, without which he could not be found guilty by this statute, and the ground on which the act of Hen. VIII. was justified was to guard against its being made a pretence and excuse; but it was seen by the more humane disposition of after times that the exhibition of so miserable an object as insanity, in the act of receiving the vengeance of offended justice, was more likely to produce very serious effects than to excite example, the express purpose of which sprung from a nobler cause, *ut pœna metus ad omnes perveniat.*

This matter was therefore cleared by the statute of 1 & 2 Ph. & Mary, c. 10, which directed that all trials for any treason shall be had according to the due order and course of the common law, and not otherwise, saving to all persons other than offenders, and such persons as claim under them, all such rights as they had at the time of committing such treasons or at any time before.

The most recent case in which lunacy was effectual to excuse a man guilty of treason was that of *James Hadfield* in 1800, who was indicted and tried at *Westminster-hall* before a special commission, for having on the 15th of May, maliciously and traitorously encompassed, imagined, and intended to put the king to death, by "buying and procuring a certain quantity of gunpowder and leaden bullets with which he loaded a pistol, and having so armed himself repaired to *Drury-lane* Theatre, and there discharged the same at the person of the king."

He had formerly been deranged, and for that cause had been discharged from the army. But it was urged, that on the day of this fact he was sufficiently sane as to warrant the credit of guilt as stated by lord *Hale*, that the degree of sound mind necessary for the discharge of a continued duty is very different from the state of mind necessary to combine guilt as to one deliberate act: and the principles already laid down of lucid intervals giving va-

lidity to contracts were likewise urged; but that the degree of sanity necessary to give validity to a contract was not necessary to enable a jury to pronounce guilt; for the distinctions between right and wrong are deeply engraved in the mind, and the traces of that distinction are never totally erased while the mind has the capacity of retaining any thing.

It was proved that the prisoner, at the moment of the audience rising on his majesty's entering his box, got up above the rest, and presenting the pistol loaded with slugs, fired it at the kings person, and then let it drop. He had sat in his place three-quarters of an hour before the king entered, and he appeared to be in a situation where a good aim might be taken, standing *upon* the second seat from the orchestra in the pit; he took sufficient time to take a deliberate aim by looking along the barrel as a man does who takes his aim: when he was apprehended, he said, "this is not all, this is not the worst that is going for-"ward;" and said to the duke of *York*, "*God* bless you—"you are a good fellow, you are his royal highness the "duke of *York*," who afterwards recognized him to have been one of the orderly men of dragoons attendant upon his highness at the battle of *Famars*—said "he knew per-"fectly well his life was forfeited—that he was tired of life, "and regretted nothing but the fate of a woman who was "his wife, and who would be his wife a few days longer "as he supposed;" these words he spoke calmly, without any apparent derangement, and so continued—he repeated that "he was tired of life, that his plan was to get rid of it "by other means; he did not mean any thing against the "life of the king, he knew the attempt alone would answer "his purpose."

It also appeared in evidence that he had in the morning shewed a pair of pistols to a friend, alleging that he had bought them for his young master, and that after cleaning

them he should make a profit of four shillings, and left one of them with him, lest both should frighten his wife, and appeared then to be perfectly cool and collected, though in lower spirits than usual.

In the defence (by Mr. *Erskine*) those cases were relied on where insanity has been held to invalidate contracts, wills, &c. that lord *Hale* calls insanity, a total deprivation of memory, but this could not mean merely recollection; for a man may forget, whether he be a subject and bear an allegiance to his king, and yet not be a lunatic, on many occasions he is possessed of a subtle memory;—strong passions, violent emotions, gusts of fury, are not insanity; that is, when the mind is under the influence of delusions operating upon them, whose reasoning proceeds upon something which has no truth, no substance nor foundation, but is vainly built upon some morbid image formed in a distempered imagination. Confirmed maniacs have been found to reason consistently on various topics, and will frequently baffle the least suspicion of their insanity until some one unexpected point discover the vulnerable state of their mind.

Two cases were stated of this nature; in one upon a prosecution against the keeper of a madhouse for illegal and malicious detention; when after a long examination, in which the case was almost confirmed, at the sudden appearance of Dr. *Simmons* upon the bench, the witness proclaimed him to be God and the Saviour of the world. The other case was similar against Dr. *Munro;* the indictment was laid by a Mr. *Wood*, who gave his evidence very consistently till the sudden appearance of Dr. *Beattie* struck upon the chord of his insanity. He was permitted to ask the witness what became of his amour with a princess? he replied, that she was imprisoned in a lofty tower, and their correspondence was interrupted, as all her letters fell into the water which inclosed the place of her confinement.

Wood preferred a second indictment, and all the most ingenious cross examination could not extort from him a single acknowledgment that he recollected any thing of this imaginary correspondence : not that his fancied love was extinguished, but that he was determined against a second defeat upon the same grounds.

On these cases it was contended that insanity is capable of assuming, and exhibiting the appearance of sanity, except when it amounts to a degree of absolute frenzy ; and it was allowed that if a man commits with premeditation, for that must always be included, a criminal act under the dominion of mischief and malice, he would in law be responsible, although as to other things he might be actually insane ; because in what he does then he is not under the dominion of his malady ; where the party is under that dominion, the case is exactly the reverse.

During the time that *Hadfield* was acting under the impressions adduced in evidence he discoursed very reasonably, and had his perfect recollection while he imagined he was acting under the command of Heaven : and there was no evidence of his having associated with seditious persons who might have inflamed his mind. The almost deadly wounds which had disordered his brain—his frequent confinement in fits of insanity—his general character, boiling with loyalty and attachment to the royal family—his mixing his own madness with that of *Truelock*, a cobler, whose committal for insanity was produced—all, and many other particulars, showed him to be *non compos mentis*.

This defence was supported by evidence that proved the prisoner to have been a private dragoon of the 15 regt. in 1793, and wounded in the action on the 18th of May, near *Lisle*—left for dead on the field—carried to the hospital in a state of insensibility—afterwards called himself king *George*, and when he saw himself in a glass felt his

head for his crown—when he was recovered sufficiently to be in the garden his comrades called him king *George ;* he replied, that was all over now and done away with, and appeared quite sensible. That three of his wounds had probably penetrated his skull and injured his brain, and after injuries of the brain from wounds there frequently follows the loss of some particular sense—sometimes the loss of sight or of hearing—sometimes a loss of memory followed by insanity, and if that immediately follows and continues for two or three years it becomes permanent ; it may not be constant, but will be excited by particular causes and circumstances : it often happens that a person thus affected is at one moment perfectly rational and seemingly in the full exercise of reason and all the powers of the mind, and at the next moment the paroxysm follows. That when common questions where put to him he answered correctly, but when any were put which related to the subject of his lunacy, on religion, and on his crime, he answered irrationally : That paroxysms come on periodically ; the approach of hot weather has often this effect, but are more frequently produced by something in the state of health, or by some external circumstance oppressing or leaving violent or sudden influence on the mind, or by the food or manner of life. That on account of his insanity he had been discharged from the army—had since been necessarily confined to his room for ten days, and had been in various fits of bawling and hallooing out, they came on with the hot season, and at the changes and full of the moon ; he then called himself a prince, Jesus Christ, and sometimes God : his dejection gave signs of the fit's approach, that then his eyes stared, he was very surly. that on the 11th of May he was growing worse—said " Jesus Christ was a damnation blackguard," and often repeated that he was " going a long way and had a great deal to do" ; on the 13th said on his return home that " he

had been to see God, that the Virgin Mary was a bloody whore, that Jesus Christ was a damned bastard, and God was a thief :" that he went out again, drank a part of a pot of beer, and returned home in the evening using similar indecent expressions ; after supper said he "was ordered to go into the garden to pray for three hours between nine and twelve o'clock, and that there he was to see God:" called himself God Almighty's servant, and was going to build a house in White Conduit fields where he was to live with the cobler *Truelock* ; that he was to be God and *Truelock* to be Satan." That about one or two in the morning he suddenly jumped out of bed, and referring to his child, a boy of about eights months old, of whom he was usually remarkably fond, said he was going to dash his child's brains out against the bed post ; said, " God damn his little eyes I will kill him," that God had ordered him to do it : on his wife screaming and his friends coming in, he ran into a cupboard and said he would lie there, it should be his bed, and God had said so, in doing this he had overset a kettle of water, and said " he had lost a great deal of blood." In the morning he denied that he had got up or awaked during the whole night—shook his fist at his wife and said he would murder her. In the following day he repeated his former expressions about God, and the Virgin Mary, and Jesus Christ, and during the very next night had frequent startings in his sleep, and appeared much worse in the morning, said he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. Spoke very highly of the king, the royal family, and particularly of the duke of *York*, went out to his master's work shop, and returned to dinner at two, but would not eat any, said " he did not need meat, and could live without it ;" asked for tea between three and four o'clock, talked of going to be a member of the society of Odd Fellows, repeated his irreligious expressions and then went out;

this was the afternoon on which he went to the theatre : that when in his right mind he was a very tender and attentive husband, and even when he was deranged his wife could manage him : that ever since his return from *France* he had been annually deranged from the beginning of spring to the end of the dog days : on the 13th of May he said " he was a prophet, and that he must eat no more as the Lord Jesus Christ had forbidden him."

From this evidence the lord chief justice *Kenyon* held that being deranged immediately before, it was not very likely that in the interval he had recovered his senses : if they were to run into nicety, proof might be demanded of his being insane at the very moment when he committed the act : that there was no reason to believe that he was a rational and accountable being when perpetrating the deed.

The jury concurred with the court in this opinion and gave their verdict to be recorded thus :—" Not guilty, it appearing to us that he was under the influence of insanity when the act was committed."

It was agreed that he should not be discharged ; he was therefore re-conducted to *Newgate* until he could be otherwise disposed of.

Consequent to this trial, the legislature passed an act in the July following,(r) declaring that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that he was insane at the time of committing the offence, and shall be acquitted, the jury shall find specially whether he was insane at that time, and declare whether he was acquitted by them on account of such insanity : and the court shall then order him to be kept in strict custody, as they shall think fit, until the king's pleasure be known ; and the king may then give such order for his safe custody as he shall think

(r) 39 and 40 Geo. III. c. 94. (1800.)

fit: and so in all like cases before the passing that act:— which warranted the detaining of *James Hadfield*.

Sect. 2. And if any person indicted shall be insane, and be so found by the jury upon arraignment, or appear so to them upon the trial, the court shall direct such finding to be recorded, and order him into strict custody until the king's pleasure be known: if any such person be brought up to be discharged for want of prosecution, the court may order a jury to be impannelled to try his insanity, and on their so finding, the court may order his confinement in like manner, and the king may give such order as he shall think fit.

Sect. 3. And in order to prevent crimes by lunatics, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and if any justice of peace shall commit him as a dangerous person suspected to be insane, such cause being expressed in the warrant, he shall not be bailed, except by two justices, one of whom shall be the first mentioned, or by the quarter sessions, or great seal.

Sect. 4. Insane persons having at different times endeavoured to gain admittance to the king by intrusion in his usual places of residence, it was therefore provided, that if any person who shall appear to be insane shall endeavour to gain such admittance, and there may be reason to apprehend that the king's person may be so endangered, the privy council, or one of the principal secretaries of state, may order his confinement; and the great seal may issue a commission to enquire into his sanity, and whether the king's person may be so endangered, and direct the sheriff to summon a jury accordingly; and if they shall find him so insane, the great seal may order his confinement so long as there shall be reason to apprehend danger to the

king's person ; and afterwards enquire into his recovery and direct him to be discharged absolutely or conditionally, or under restrictions as shall seem meet.

In consequence of this act, the judges have remanded prisoners, who have been found to be lunatics, to their prisons, until his majesty's pleasure be known, where they have remained under the care of the keepers, and have been attended by such medical skill as the county has afforded ; but their number is now greatly increased, which has justly excited the farther attention of the legislature.

CHAPTER XV.

OF COUNTERFEITING INSANITY.

THE regular method of investigating the plea of insanity,(*a*) offered in excuse for crimes, or in delay of punishment, was by an inquest impannelled for that purpose, as in the case of *Somerville ;* and if the finding was that he be lunatic only by covin or dissimulation, he was then tried upon the principal matter; and not condemned to *peine forte et dure* as in cases of felony : but if he would not answer directly, being of sane memory, he was condemned upon a *nil dicit* and received judgment : if he were found lunatic, his trial was deferred. And it was fully agreed that if he plead the general issue not guilty, and afterwards upon evidence come and not speak directly, yet he was not deemed lunatic having once answered directly.

So a felon upon his arraignment appeared to be mad and the same process was adopted.(*b*)

(*a*) Savil 50. (*b*) 1 Anderson, 107.

APPENDIX.

[VIDE TITLE.]

A man may show, he was* non compos mentis *in avoidance of his deed.

Webster *versus* Woodward.—3 *Day's Rep.* p. 90.

MOTION for a new trial.

THIS was an action of ejectment, to recover the undivided moiety of certain lands, which the plaintiff and *Timothy Webster* had conveyed to *Miller Fish*. Upon trial of the cause, at *Hartford*, *February* term, 1808, a verdict was found for the plaintiff. A motion for a new trial was then made by the defendant, and the following reasons assigned; viz. that the court admitted the plaintiff to prove, as the sole ground of his right of recovery, that the plaintiff was a man of weak capacity, and thereby incompetent to convey estate; that the court admitted the plaintiff to go into the proof respecting the weakness of his understanding, in contradiction to the acknowledgment of two certain deeds of bargain and sale made and acknowledged before a justice of the peace, on the 17th day of *May*, 1799, which deeds conveyed the demanded premises to *Miller Fish*; that the court admitted the plaintiff to produce proof as to the value of the demanded premises, as evidence to show, from the inadequacy of price, that the plaintiff was a man of weak capacity. A rule to show cause was therefore granted; and the question reserved to be argued before the nine judges.

Goodrich and *Dwight*, in support of the motion, argued,

1. That weakness of understanding does not incapacitate a man to contract.

2. That no man can avoid his own deed, by stultifying himself.

1. There is a distinction, always to be regarded, between idiocy, and weakness of understanding; the one supposing a total destitution of mental capacity, the other implying the existence of understanding, though in a small degree. The term *non compos mentis* does not apply to a person of weak capacity, but only to one who possesses not the exercise of reason. It is the latter description of persons only, whose acts are void or voidable, merely for defect of understanding; and such only are contemplated, in *England*, by the statute 17 *Edw.* II., which was declaratory of the common law. 4 *Rep.* 126. For no person of the age of discretion, is, in law, presumed to be *non compos mentis*, and therefore is not to be restrained in the exercise of any lawful right, until he is ascertained to be so, by a commission issued for that purpose from the court of chancery. 3 *Bac. Abr.* 528. On this fact being thus found, the law gives the custody of the person and his estate to the king, that the person may be protected from harm, and the estate from waste. The immediate care of the lunatic may, however, be intrusted to one commissioned for that purpose, whose acts are subject to the control of the court of chancery. 3 *Bac. Abr.* 529. Hence originated our statute authorizing the appointment of a conservator; which gives to that officer the same authority which is possessed by the committee of a lunatic, and vests in the county courts powers similar, in this respect, to those of the court of chancery. This statute, directing the manner in which such persons, if without property, shall be supported, speaks of persons "*naturally wanting of understanding*, so as to be unable to provide for themselves,"

and of such as, "by the providence of God, fall into distraction, and become *non compos mentis;*" and of those who, "by age, sickness or otherwise, become poor and impotent.(*a*) And in a subsequent section, it is said, "But if *such idiot*, distracted or impotent person have any estate, the county court of that county where they dwell, may order and dispose thereof." Here, while we remark, that the object of this statute appears to be the same with that of 17 *Edw.* II., the phraseology used in this section is to be particularly observed, as it shows, precisely, what description of persons was meant by those who are *naturally wanting of understanding*, mentioned in the first section. For, however reasonably the term, in itself, might be taken to extend to a person of *weak understanding*, yet since, referring to these persons, the phrase *such idiot*, is used in the subsequent section, this latitude of construction is evidently forbidden; and the meaning of the statute, in this part of it, confined to idiots, distracted persons, and those who by age, sickness or otherwise, become *poor and impotent.* The statute 17 *Edw.* II. says nothing of persons of weak understanding, but speaks only of *natural fools* and *lunatics. Bac. Abr.* 529.(*b*) Our statute, indeed, in another part (sect. 8.) goes farther than this, and provides, that if the selectmen "shall find any person or persons that are reduced, or are likely to be reduced, to want, by *idleness, mismanagement, or bad husbandry*, that then such selectmen may appoint an overseer to advise, direct and order, such person in the management of his business;" and that "no such person, while under such appointment, shall be able to make any bargain or contract, without the consent of such overseer, that shall be binding or valid in law." But on the subject of persons of weak mind, the statute

(*a*) Stat. Conn. tit. 33. c. 1. s. 1.
(*b*) See also Lord Donegal's case, 2 Ves. 407. Ex parte Barnesley. 3 Atk. 168.

silent. By neither of these statutes, then, are such persons rendered incapable of making contracts. And although many cases have occurred, in which it appeared that advantage had been fraudulently taken of the imbecility of such persons, and, on that ground, their contracts have been annulled; yet it has been uniformly held, that where that reason did not exist, they were not to be relieved, either at law or in equity. 1 *Fonbl.* 57. 3 *P. Wms.* 129. *Osborne* v. *Fitzroy.* "Where a weak man gives a bond, if there be no fraud, or breach of trust, in obtaining it, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis;* neither will this court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity." In the case of *Bennet* v. *Vade*, 2 *Atk.* 324., on a bill brought by the heir at law of sir *John Lee*, to set aside the conveyance of his estate, upon a suggestion of fraud and imposition, lord *Hardwicke* agreed, "that if sir *John Lee* was not insane, but only weak, he might do an act that will bind him; for there cannot be two rules of judging at law and in this court upon the point of insanity." If, then, mere weakness of understanding does not incapacitate a man to contract, it follows, that when he contracts without fraud or imposition, his contract is binding. That this sale was affected in consequence of any fraudulent practices on the part of *Fish* does not appear. Nor is any other mark of fraud suggested, than that the price was inadequate to the real value of the land. It is conceded that such a circumstance as *total* inadequacy of price, coupled with great weakness of mind, in the grantor, will raise strong presumption of fraud; but the facts which appear in this case authorize no such presumption. Indeed, the court admitted proof of the value merely as evidence of *Webster's*

weakness, and not of fraud or oppression on the part of *Fish.*(*a*)

[The counsel for the plaintiff here objected, that on the trial of the cause, they did not proceed on the ground that the plaintiff was a man merely of weak understanding, but that he was *non compos mentis.*

SMITH, J., on referring to his minutes, then stated—That on the trial of the cause, the defendant having given in evidence two certain deeds from the plaintiff and his brother *Timothy Webster*, conveying all the lands in question to *Miller Fish*, the defendant's counsel objected to the admission of evidence to prove the incompetency of the plaintiff to convey lands; because the deed, having been acknowledged before a public officer, authorized to take such acknowledgment, there could be no averment against such solemn act; and because no man can be permitted to allege his own incapacity to avoid a conveyance. The court overruled the objection, and admitted the evidence.]

This statement of the case seems not very obviously to present a specific question. Are we to argue the point, that proof of the plaintiff's *incompetency to convey* should not have been admitted? If the evidence offered were, generally, that he was *incompetent*, without showing the reason of the incompetency, whether *infancy*, *idiocy*, *lunacy* or *imbecility*, the point would scarcely admit of argument. If the point is, that *no man* can allege his own incapacity, we have no case; because *infancy*, clearly, may be alleged.

[TRUMBULL, J. I understand the question, upon the statement, to be, whether a man may be allowed to stultify himself.]

That a man cannot stultify himself, to avoid his own grant, is a well established principle of the *English* law. It is so said by *Littleton*, sect. 405.; and has been so held in a multitude of cases, since his time. In *Beverley's* case,

(*a*) How far inadequacy of price will operate to vacate a contract, see Ambl. 18. 1 Bro. Chan. Rep. 9. 2 Bro. Chan. Rep. 175. 179. 10 Ves. jun. 474. 7 Ves. jun. 137.

4 *Rep.* 123., it was resolved, "that every deed, feoffment or grant, which a man, *non compos mentis*, makes, is avoidable, and yet *shall not be avoided by himself*, because it is a maxim in law, that no man of full age shall be, in any plea to be pleaded by himself, received by the law *to stultify himself, and disable his own person.*" A contrary opinion is, indeed, given by *Fitzherbert. F. N. B.* 449. D. But in the case of *Stroud* v. *Marshall*, *Cro. Eliz.* 398., in debt on an obligation, *non sane memory* was adjudged to be no plea; and the opinion of *Fitzherbert* expressly held to be not law. So also *Co. Litt.* 247. And in *Cross* v. *Andrews*, *Cro. Eliz.* 622., an action on the case against an innkeeper, for not keeping the goods of his guest safely, in which the defendant pleaded that he was sick, and of *non sane memory*; this plea was held insufficient, because "it lieth not in him to disable himself no more than in debt upon an obligation." The principle is also recognized by lord *Holt*, in *Thompson* v. *Leach*, 1 *Ld. Raym.* 315.; and is found in 3 *Com. Dig.* 483. D. 6. 3 *Bac. Abr.* 537. 15 *Vin. Abr.* 137. D. 2. 1 *Fonbl.* 45. The utmost danger is to be apprehended in admitting the doctrine, that a man may stultify or disable himself in court; as it is a direct contradiction to a plain maxim of the common law; as it would give rise to endless disputes, and would afford ample scope for fraudulent practices. It need not be denied that inconveniences may sometimes result from the doctrine for which we contend. If this were a sufficient objection, it might be made, with equal reason, against the establishment of all general principles. The inconveniences to be feared from admitting the maxim of the common law, are, however, comparatively small. With respect to absolute idiots and madmen, the danger is nothing. But from the least portion of intellect to the greatest, the gradations are innumerable; and who shall determine at what point intellectual weakness ends, and idiocy begins? There is.

and can be, no standard of mediocrity. Leave men to the plain principles of the common law, and friends will take care of the weak and incapable. But if it is once understood, that the contracts of a person *non compos mentis* are void, all very weak men, if their friends shall think it for their interest, may be made, for this purpose, *non compos mentis ;* and the imagination can scarcely explore the field of mischief to its limits. After all, we are aware it may be said, that this doctrine has heen exploded in this state. It is true, cases have occurred, within the last fifty years, in which it has been held, that a man might stultify himself. Such decisions are found, however, only in this state; and our own state of society offers no reason to show that the operation of the *English* common law would be inequitable here. It cannot truly be asserted, that the adoption of this principle would create new rights, inconsistent with those which the contrary decisions have conferred; because this is not one of those cases in which a great mass of property has conformed itself to the decisions. By the *English* common law, the disability of a grantor to avoid his own deed, by showing insanity, effects not the rights of his heir or executor; since, for them, this is good reason to avoid the grant; (4 *Rep.* 124.) and the *heir* may even enter without a *scire facias*. 15 *Vin. Abr.* 136. D. As to the lunatic himself, the provisions of our statute sufficiently protect him. But if he be permitted to plead his own insanity, within what limits shall this liberty be confined? Suppose one called as a juryman declares himself insane. Is the fact then to be ascertained, and the question settled? Or one is elected to an office, and makes the same objection to serving. The same question is to be settled before he can legally be excused. An idiot or lunatic is certainly to be considered as personally removed from all civil obligations and duties to socie-

ty.(a) But surely he should not be thus discharged, on his own plea, in a mere civil action. The public have an interest in the question; and no man should be disfranchised or discharged from his public duties, until his idiocy or lunacy has been solemnly established by a public inquisition. And can the law be called a safe one, as it respects the public, or individuals, that a man may, by mere civil plea, discharge himself from his duties to society, and cut himself off from its privileges? In criminal cases, indeed, the party accused may excuse himself on the ground of insanity; and with great propriety; for the law, here, only concurs with reason and humanity, which revolt at the idea of punishing a man for the commission of a crime of which he must have been unconscious, and the restraints to which have been removed by the mere act of providence. But in such cases, the question of insanity is decided on a charge made by the public, in an issue to which the public is party. It is also unavoidable; because we are under a necessity either to admit the plea, or run the hazard of punishing a man who is not a moral agent. It may be said, on the whole, that this is always a question of much importance; deeply affecting the welfare of the party, and the interest of his friends; and one in which society have a near concern. Its determination should, therefore, be accompanied with more solemnity and caution than can attend the hearing of an incidental plea in a civil action.

In addition to the reasons alleged against the general doctrine, it is to be observed, as to this particular case, which is an action of ejectment in the usual form, that from the declaration the defendant has no notice of the ground of the plaintiff's claim, and therefore cannot be prepared to disprove his idiocy.

(a) "Fools and madmen are tacitly excepted out of all laws whatsoever." 15 Vin. Abr. 137.

E Perkins and *Brace*, contra. The doctrine, that a man can in no case be admitted to stultify himself, although now received to be law in *England*, was not anciently so considered; nor has it been, in modern times, universally approved of, or acquiesced in; for to some, as is said by lord *Coke*, the civil law, by which all acts done by idiots or persons *non compotes mentis*, without their tutor, are utterly void, seems more reasonable than the common law. 4 *Rep.* 126. There is, in fact, much absurdity in permitting persons under the age of twenty-one years, to avoid their own deeds, because they are supposed wanting in discretion to contract, and yet denying this privilege to idiots and lunatics, who must be, at least, equally destitute of discretion. The common law, indeed, tacitly admits this absurdity; for while it leaves utterly without remedy the party from whom providence has withheld the means of self protection, and who, therefore, more needs the protection of the law, it still makes the grant of a person *non compos* voidable by the king, and by the representatives of the grantor. What good reason, if any, there may have been for the distinctions which are found(*a*) between the cases of infants and persons *non compos*, as to their capacity to contract, and for many consequent distinctions, it is now impossible to discover. These distinctions, which seem to have been the result of a departure from the course which common sense dictates, *Fitzherbert*, in his comments on the writ of *dum fuit non compos mentis*, does not scruple to reject as groundless. His opinion has been alluded to, and is strongly opposed to the modern doctrine. "Some have said, that writ lieth not by him who alieneth the land, because he shall not disable himself, nor contradict his own deed; but that seemeth to be little reason; for this is an infirmity which cometh by the act of God, and it standeth with reason that a man should

(*a*) See. Co. Litt. 247. 4 Rep. 125.

show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." He then shows an analogy, as to want of discretion, between *insanity* and *infancy;* and because an infant may allege that he was within age at the time of his feoffment, "*a fortiori*, then he who is of *non sane memorie* shall allege that he was not of *sane memorie* at the time of his feoffment or grant, for he who is of unsound memory hath not any manner of discretion." In this opinion, although it has been held no law, *Fitzherbert* is not singular. The same has been, at least, intimated by sir *William Blackstone*, 2 *Com.* 296.; and *Buller's N. P.* 172., says "The defendant may give in evidence, that he made him sign it (an obligation) when he was so drunk that he did not know what he did; *or that he was a lunatic at the time.*" This was done in the case of *Yates* v. *Boen*, 2 *Stra.* 1104. And in *Thompson* v. *Leach*, 3 *Mod.* 310., the court expressly say, that the grants of infants and persons *non compotes*, are parallel, both in law and reason; and that as there are express authorities(*a*) that a surrender made by an infant is void, therefore the surrender then in question, made by a person *non compos*, was also void. Though this conclusion will not, perhaps, be denied, it will still be said, that the reason for which the grant is void, if it be insanity, and not infancy, is not to be shown by the party himself. But why is not the parallel to be carried through? Because, in the language of the common lawyers, "when he recovers his memory, he cannot know what he did when he was *non compos mentis*." This, in reality, is exactly the reason that common sense would suggest, why he *should be* permitted to avoid his grant. The reason, however, has been perverted to a wrong application, by indulging in speculations too refined for useful practice, but which cannot, perhaps, easily be shown, on abstract principles.

(*a*) Lloyd v. Gregory, Cro. Car. 502.

to be false. A man, it is said, cannot remember an act done by him while he was devoid of reason and of memory; and must, therefore, afterwards be unable to say any thing respecting it. Without inquiring how far mental derangement may impair the memory, we venture to say, that the *fact* may as safely, and as consistently with good sense, be allowed to be *put in issue* by the party himself, as by his *heir* or his *executor*. In criminal cases, this is always permitted, though it would be difficult to show, that criminal acts committed by the party during his insanity can better be remembered by him, than acts of a different nature. The maxim, however, there is reason to believe, is peculiar to the common law of *England;* and was, as we are told by *Fonblanque*, "endeavoured to be set up by the common lawyers in defiance of natural justice, and the universal practice of all the civilized nations in the world." Certain it is, the maxim has not yet been adopted in *Connecticut*, but has been opposed to many contrary decisions; as is agreed by the counsel for the defendant. Here, indeed, the reasons against the adoption of this doctrine, aside from these decisions, apply with peculiar force; because here a *scire facias* does not lie to avoid the alienations of a person *non compos mentis;* nor can actions against him be set aside by *supersedeas*, as in *England*. So that, notwithstanding the provisions of our statute, he is left without efficient protection, if his plea of *non sane memory* is refused.

By the Court unanimously. It is not a question, whether a deed, executed by a person *non compos mentis*, is voidable, for want of capacity in the grantor to convey. All admit that it is; and that such a deed may be avoided, in a court of law, by the heirs of the grantor; although, it is said, that by the common law, this cannot be done by the grantor himself. That this doctrine is supported by decisions of the *English* courts is true; and the reason assign-

by those courts is, that a man shall not be admitted to stultify himself. But this was not always the common law of *England*. Certain it is, there is a writ in the *register* given to a man who has been insane, and who, during his insanity, has aliened his land, to recover it, after his reason is restored. In the time of *Edward* the first, *non compos mentis* was allowed to be a sufficient plea to avoid a man's own bond. It was not until the reign of *Edward* the Third, that any scruple was entertained respecting the power of a person, who had been *non compos mentis*, to avoid his act; and it was as late as the reign of *Henry* the Sixth before there was any judicial determination, that a person who had been *non compos mentis* could not avoid a deed given by him, during his insanity. This determination was followed by similar decisions, and received by most of the *English* writers to be settled law. Justice *Blackstone* observes, that this doctrine sprung from loose authorities; and he manifestly approves the opinion of *Fitzherbert*, who rejects the doctrine, as contrary to reason. He says also, that later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it. This rule has been supported with great earnestness by *Powell*, who gives a reason in support of it, which is not to be found in the books, *viz.* that a different rule would open a door for fraud; because a man might feign himself *non compos mentis*, that he might enjoy the privilege of avoiding his contracts, if he chose to do so. This reason affords no additional support to the opinion, that a person *non compos mentis* cannot avoid his deed; since the same temptation exists, in the present state of things, to commit fraud; for although the person cannot, himself, avoid his deed, by showing insanity, yet by a proceeding in *England*, founded upon a writ issuing out of chancery, to certain commissioners, a person may be found *non compos mentis*, and immediately, in his life-time, a *scire facias*

may issue in the name of the king, who by law is guardian to all persons *non compotes mentis;* and the deed of any one who is so found, by the proceeding, may thus be avoided. Application may also be made, in such cases, in chancery, by the attorney-general to vacate the deeds. Thus, that which cannot be done directly, by the insane person himself, in the ordinary mode of proceeding in courts, may be done circuitously, and that in the life-time of the insane person. The temptation to fraud is, therefore, as great as if he were allowed to plead his incapacity in the ordinary method. When we find that the ancient common law was, that a man might allege his own incapacity to avoid his deed, and that this remained law during a long period of time, and has never been altered by any legislative act, but the contrary doctrine depends upon decisions of courts, in direct opposition to the common law, whose business it is to expound, and not to make, the law; and that these decisions have been rejected as not law, by some of the most eminent lawyers, and with reluctance submitted to by others, who reprobate them as productive of great inconvenience; and that we have no such proceedings by *scire facias*, or bill in equity, to avoid the acts of a person *non compos mentis*, during his life; and that, if this be done at all, it must be by such person's alleging his incapacity, as is done in this case—we are not inclined to advise a new trial.

New trial not to be granted.

It is the duty of the Judge of Probate, before the appointment of a guardian to one as a lunatic, non compos, *&c. to give notice to the party that he may be heard on the question, whether such appointment be necessary or proper.*

Of proceedings in courts of Probate.

Chase, *Appellant, &c. vs.* Hathaway.—14 *Mass. Rep.* 222.

THIS was an appeal from a decree of the Judge of Probate for the county of *Bristol*, assigning the said *Hathaway* to be guardian of the appellant, who had been adjudged and certified by the selectmen of the town of *Berkley*, of which he was an inhabitant, to be incapable of taking care of himself.

The reasons of appeal, filed in the court below pursuant to the statute, were as follow, *viz* 1. That he was not, at the time of the adjudication of the said selectmen, an idiot, non compos, lunatic or distracted person, and incapable of taking care of himself.—2. That he had no notice of the time and place, when and where the said selectmen made their pretended inquisition and adjudication.—3. That notice was not given to him, that any representation or adjudication was exhibited in said Probate Court against him; nor notice that any decree would be made by said court, affecting his rights; and that he was divested of his liberty and property, without any opportunity afforded him of being heard upon the subject.—4. That the said *Barzillai Hathaway* was not a suitable person to be a guardian.

Baylies for the appellant relied principally upon the want of notice to him, of the inquisition of the selectmen of *Berkley*, and of the proceedings and decree of the Probate Court: and he contended that, although this notice was not expressly prescribed by the statute, yet that it was matter of common right, and the want of it would

avoid the whole proceedings.—Relying upon this point, he offered no evidence in support of the first and fourth reasons of appeal.

Tillinghast for the respondent. As this proceeding was wholly a matter of judicial discretion in the Judge of Probate, it must be presumed that every necessary and proper measure was adopted by him, previously to passing the decree; although the record does not exhibit every minute step in the process. It is worth consideration too, what desirable effect notice to a person *non compos*, and so unable to avail himself of such notice, can produce.

The opinion of the court was delivered by

Parker C. J. This case comes before us on an appeal from a decree of the Judge of Probate for the county of *Bristol*, whereby the respondent *Hathaway* was appointed guardian of the person and estate of the appellant, found to be a person *non compos mentis*. The proceedings of the Judge of Probate are founded upon the return of an inquisition, made by the selectmen of the town of *Berkley*, of which *Chase* is an inhabitant: and the inquisition was taken pursuant to a commission from the Judge of Probate, which issued upon the application of certain inhabitants of said town, according to the provisions of the statute of 1783, *c.* 38, § 5.

It does not appear, by the copies of the probate proceedings produced by the appellant, that he was present before the Judge of Probate, or before the selectmen when their inquisition was taken, or that he had any notice from the selectmen of the time and place appointed by them to make their inquiry, or from the probate office of the return of the commission, or of the time assigned by the judge for considering and acting upon it. Upon the supposition that some material papers had not been produced, we should have postponed the hearing upon this appeal, until full copies were produced: but it being admitted that the

copies actually produced shew the whole of the transactions in the probate office, we must decide upon the sufficiency of these transactions to support the decree of the judge, which is appealed from.

The want of notice to the supposed *non compos* is the subject of two of the reasons assigned for the appeal: and another contains a denial of the fact, that the appellant is of unsound mind. On this latter we should hear testimony, and decide upon the liability of the appellant to the process under the statute, if the proceedings in the Probate Court had been correct in substance and in form. But being of opinion that the second and third reasons of appeal are sustained in point of law, we make no inquiries respecting the state of mind of the appellant: because upon another inquisition, which may be taken and returned, and adjudicated upon by the Probate Court more correctly, the fact can be better ascertained, than before us under the present circumstances.

There being no provision in the statute for notice to the party who is alleged to be incompetent by reason of insanity to manage his estate, it seems that the Judge of Probate did not think such notice essential to his proceedings. But we are of opinion that, notwithstanding the silence of the statute, no decree of a Probate Court, so materially affecting the rights of property and the person, can be valid, unless the party to be affected has had an opportunity to be heard in defence of his rights.

It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property; unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the legislature has provided that, on account of crime or misfortune, the publick safety or

convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the fact shall be ascertained; it is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard in support of his innocence or his capacity.

It has been intimated that notice to an insane person would be of no avail, because he would be incapable of deriving advantage from it.—But the question upon which the whole process turns is, whether *he is* insane: for the presumption of law is, that every man is of sound mind, until the contrary is proved: and it being possible that interested relatives might falsely suggest insanity, with a view to deprive the party of the power of disposing of his estate; that very possibility should be guarded against by personal notice to him when practicable, that he may expose himself to the view of the judge, and prove by his own conduct and actions the falsity of the charge.

We should think it advisable, at least, that whenever commissions shall issue from the Probate Court to selectmen, to take an inquisition, they should contain an order that notice be given to the party complained of, that he may appear before the selectmen. This would be conformable to the practice of the Court of Chancery in *England*. It is held there to be *the privilege* of the party, who is the object of a commission of lunacy, to be present at the execution, and in a case before the Lord Chancellor, he inclined to quash the inquisition, the commission not having been executed near the place of abode of the lunatic, and the order that he should have notice having been disobeyed. A hearing before the selectmen, however, may not be essential, although expedient; as the inquisition is not conclusive, and there is another opportunity to traverse it.

But whether notice by the commissioners is essential or not, we are clear that it ought to be given before the adjudication in the Probate Court: and that without it such adjudication is null and void. A notification, served and returned in the manner practised with civil processes, would be sufficient; the time ought to be prescribed by the Judge of Probate.

In Chancery it has been held, that a traverse to the return of an inquisition is a *right by law*, although the Lord Chancellor is not dissatisfied with the return upon the evidence: an order was therefore suspended, for the purpose of taking the traverse. This is done in *England*, by carrying the case into a court of common law, and taking the verdict of a jury. With us the Judge of Probate would try the question.

Indeed it would seem strange, that the whole estate of a citizen might be taken from him, and committed to others, and his personal liberty be restrained, upon an *ex parte* proceeding, without any notice of the pendency of a complaint, upon a suggestion of lunacy or other defect of understanding: while the depriving him of the minutest portion of that property, or the slightest detention of his person, would be illegal upon a charge of crime, or of a breach of a civil contract; unless all the formalities of a trial were secured to him, by the forms of process and the regular execution of it.

We have been surprised of late, to find an irregularity in the probate offices, in several of the counties; which we think it important should be corrected in their future proceedings. It consists in the omission to enter of record orders and decrees, which often have an essential and final effect, upon property to a very considerable amount. In the case now before us, it appears that no formal decree was ever passed, declaring the appellant *non compos:* or if passed, that the only evidence of it rests in the recital,

which precedes the letter of guardianship. In a late case in *Cumberland*, the only evidence of a decree allowing and approving a last will and testament, was of the same nature. This seems to us as irregular, as it would be for a common law court to issue execution, without any evidence of a judgment, except what might be contained in the execution.

A Court of Probate, although not technically a court of record, ought to have a perfect record of all its orders and decrees: and it was for this purpose principally, that the constitution established the office of register. Orders of notice, among other things, should be recorded: or if not, should be filed, with the return upon them: and in all important decrees, if previous notice has been given, that fact should be recited in the decree.

We have been thus particular, with a view to produce uniformity of practice in a court, whose duties and jurisdiction affect, at one time or another, every estate in the community. And it is the more important, that this should be attended to in the probate offices; as any material defect will render the proceedings null at any period, when they shall be brought in question; it having been determined that orders and decrees of those courts may be avoided by plea: they not being, like judgments at common law, reversible by writ of error. *Decree reversed.*

A person, to whom, as a non compos *the Judge of Probate has appointed a guardian, is still liable to be sued in a civil action, and to be committed in execution.*

Ex parte Leighton.—14 *Mass. Rep.* 207.

THE said *Leighton* was brought from the prison of the county upon a writ of *Habeas Corpus*, on which the keeper of the prison had returned that he was committed on an

execution issued upon a judgment against him in a civil action, a copy of which accompanied his return.

It appeared that *Leighton* having been duly found *non compos*, the Judge of Probate for this county had appointed a guardian of his person and estate, pursuant to stat. 1783, *c.* 38, § 3; and that the action, in which the said judgment was rendered, was commenced after the appointment of a guardian as aforesaid.

The Court, after looking into the statute, and the case of *Thacher & al.* vs. *Dinsmore*, held the return sufficient, and *Leighton* was remanded to prison.

One who is* non compos mentis, *not having estate sufficient to give him a settlement in virtue thereof, follows the settlement of his father, as well after he comes to age as before.

Upton *vs.* Northbridge.—15 *Mass. Rep.* 237.

ASSUMPSIT for the expense of supporting *Israel Hill*, a pauper alleged by the plaintiffs to have had his lawful settlement in *Northbridge*.

At the trial before the *Chief Justice*, at the last April term in the county of *Worcester*, nothing was in dispute, but the question of settlement; and relative to that point, the following facts were proved, *viz.*—The pauper was the son of *Jacob Hill*, who had formerly removed from *Upton* to *Northbridge*, and had gained a settlement in the latter town before the year 1793; which settlement continued to that time. In that year, and while the father's settlement was in *Northbridge*, the pauper came of age. Afterwards, and before the year 1802, the said *Jacob Hill* returned to *Upton*, and acquired a settlement there in that year. The pauper removed with his father to *Upton*, not having left the family, or gained any settlement in his own right.

The plaintiffs contended that the pauper, having the derivative settlement of his father in *Northbridge* in the year 1793, continued that settlement to the time of his death, which happened a short time before the commencement of this suit, he not having gained a new settlement any where.

The defendants insisted that the pauper remained of his father's family, and so had his new settlement with his father in *Upton*, in the year 1802: because he was *non compos mentis*, and incapable of gaining a settlement for himself.

There was much evidence offered to the jury, tending to prove the capacity or incapacity of the pauper.—It appeared that he had earned his living, by letting himself out to farmers in the vicinity, making his own bargains, and being considered honest and industrious; but not entitled to the common wages of labourers, for want of ordinary skill in business. He made small contracts relative to his labour, taking and giving promissory notes to a small amount occasionally, from and to those with whom he dealt. He resided at his father's house in *Upton* in the winter, and generally in the spring used to hire himself out for a week or a month, and sometimes more at a time; taking his wages, commonly about half what was usual for labourers, in clothes, grain, &c. which he often carried to his father's; usually going there once in a week or fortnight, while thus labouring abroad. He was never taxed, even for his poll; and was never enrolled with the militia; was considered odd and strange, but was always harmless.

The *Chief Justice* directed the jury to return a verdict for the plaintiffs or the defendants, as they should find, from the evidence, the pauper to be *non compos mentis* or otherwise; and he stated to them, if they were satisfied, from the manner of his life and conduct, and the dealings of people with him, that he would have been a suitable sub-

ject of guardianship for want of understanding, provided a commission had issued from the Probate Office to inquire into that fact, they should consider him *non compos*.

The verdict was returned for the defendants, on the ground that the pauper was *non compos*, and so remained a part of his father's family; although of the age of twenty-one years, when his father removed to *Upton*.—The question of law was reserved for the opinion of the whole court, whether upon the facts the verdict was right. If it was, judgment was to be entered upon it: if not, it was to be set aside, and the defendants to be defaulted.

Parker C. J. This case presents an important question, which seems yet to have been left unsettled. The pauper, for whose support the suit is brought, is found by the jury to have been *non compos mentis;* and from the facts proved, it is to be presumed that he has been so *a nativitate*. In 1793 the pauper's father had his settlement in *Northbridge;* and the pauper was then twenty-one years of age, and but for his imbecility was capable of acquiring a settlement himself. The removal of his father to *Upton*, and his regaining a settlement, would not, but for the cause aforesaid, have carried with it the settlement of the pauper: but his settlement would have remained in *Northbridge*, until he had gained a new one in his own right.

We are clear that, being *non compos*, he remained one of his father's family, and continued to derive his settlement under him. The pauper was not capable of any act, by which he could gain a settlement for himself; and therefore, like a slave in former times, or a wife, or minor children, his settlement changed with that of his father.

As to the objections, which have been raised in the argument, that a *non compos* may inherit land, or may by possibility acquire property in other ways; we do not mean to decide that a person so circumstanced cannot, *by*

virtue of his estate, acquire a settlement. It has been decided that minors, who are *forisfamiliated*, may under the statute of 1789, *c.* 14, by occupancy of estate belonging to them, acquire a settlement. But in the case before us, the pauper had no estate; and he continued of his father's household, as much as his wandering life would allow; and no town ever ventured to consider him as subject to any of the duties of a citizen. *Judgment on the verdict.*

If a lunatic under guardianship be restored to his reason, he may make a will, although the letters of guardianship be unrepealed.

Stone, appellant, &c. *versus* Damon and others.—12 *Mass. Rep.* 488.

THIS was an appeal from a decree of the probate court of this county, disallowing a certain instrument, offered for probate as the last will and testament of *Isaac Stone* deceased. The question being on the sanity of the testator, an issue was formed to the country, which was tried before the whole court, pursuant to the statute.

The will was dated the first of July 1811. It appeared that upon an inquisition duly made in April 1808, under the statute of 1783, *c.* 38. § 3. the testator was found to be *non compos*, and a guardian was assigned him by the judge of probate. The court permitted the decree making this assignment, which had never been reversed, to go in evidence to the jury, but not as conclusive: and upon proof of the state of the testator's mind for some time before and after, making the will, the jury found him of sound mind.

The counsel for the respondents then moved for a new trial, on the ground that the decree assigning the guardian to the testator as *non compos*, was conclusive on that point, so long as it continued in force: and they cited the case of *White, adm.* vs. *Palmer.*

The court afterwards confirmed the opinion they had expressed on the trial. They observed that in the case cited, the question turned on the right of the guardian to prosecute and defend actions, and to transact the business of his ward: that it would be inconvenient and unjust, if one who had paid his debt to a guardian should be liable to pay the same again to the ward, upon proof that he had previously recovered his reason; or if a guardian, when suing for a debt due to his ward, should be required to prove all the facts, on which the decree of the judge of probate was founded.—That for these purposes the decree might be deemed conclusive without injury to any one, as it would only go to confirm the lawful acts of the guardian during the continuance of his authority; without which no person could safely deal with the guardian as such.—But in the present case the question was on the personal ability of the deceased to devise his estate; an act which the guardian could not do for him. The decree was evidence of his insanity in 1808; and like any other evidence of that fact,would throw the burthen of proof on the appellant, to shew that the testator had afterwards recovered his reason. But evidence of insanity in 1808, would not shew conclusively that he was insane in 1811. If a lunatic should be restored to his reason, and become perfectly capable of devising his estate, it would be a cruel and unnecessary addition to his misfortune, to deprive him of that right, and to set aside his will, because he happened to die before he could apply to the probate court for a reversal of the decree; or because those, who might be interested in avoiding his will, should by appealing, or other means of delay, prevent the reversal of the decree before his death.

Upon the question, whether a guardian shall be appointed to a person non compos mentis, the court will receive other evidence than what arises from an examination of the person himself.

Ithamar Brigham *versus* Abraham Brigham.—12 *Mass. Rep.* 505.

THIS was an appeal from a decree of the judge of probate for the county, refusing to appoint a guardian to the said *Abraham*, upon the complaint of the said *Ithamar*, his brother, who represented him as *non compos mentis*, and he had been found such by the inquisition of the selectmen of the town of which he is an inhabitant.

When the appeal came on to be heard in this court, *Draper*, for the appellant, objected to any evidence being received as to the degree of intellect of the party; contending that the only trial must be by the inspection and examination of the person himself.

But the court overruled the objection, and after examining several witnesses, the party himself not being present, affirmed the decree of the judge of probate.

An inquisition by the selectmen that one is non compos *and an appointment of a guardian for that cause, are not justified by evidence that the person is old, and has become less careful of his property.*

Darling, Appellant, &c. *versus* Bennet.—8 *Mass. Rep.* 129.

THE decree of the probate court appealed from in this case had appointed the respondent *Bennet* guardian of the person and estate of the appellant as a person *non compos mentis*. This decree was founded upon an inquisition made by the selectmen of the town of *Middleborough* of which the appellant, is an inhabitant, by virtue of a warrant issued by the judge of probate, pursuant to the provisions of the statute 1783, c. 38. § 3.

Upon examination of witnesses it appeared that the appellant was seventy eight years of age ; that for a man of his years he possessed good rational powers, that his children were profligate and intemperate ; that the father for sometime past had been under their influence, and had been induced to spend his property for their undue indulgence : and that until within a few years he had been uncommonly careful of his property : and the alteration of his habit in this respect seemed to have been the ground of the opinion which the selectmen had formed in the case, and to have been also the foundation of the decree complained of.

By the court. The judge of probate was sufficiently authorized, by the inquisition of the selectmen, to make the decree which he did. But upon the facts now before us there is certainly no sufficient foundation to place the appellant under guardianship as a person *non compos mentis.* Perhaps it would be proper to place guardians over the children, who are causing their father to waste his estate in gratifying their vicious propensities. Further, if the appellant cannot be otherwise protected from the undue practices and impositions of his children upon him, it may yet be discreet and proper for the judge of probate, upon due representation from the selectmen, to place him under guardianship as a spendthrift, that the family may be preserved from want, and the town saved from the expense of their support.

On the question of the sanity of a testatrix at the time of executing her Will, which was in issue to the country, the physicians were enquired of, whether from the circumstances of the patient, and the symptoms they observed, they were capable of forming an opinion of the soundness of her mind; and if so whether they from thence concluded that her mind was sound or unsound: and in either case they were required to state the circumstances or symptoms, from which they drew their conclusions.—Where the testatrix at 11 o'clock in the morning gave directions to her scrivener as to making her Will, which she executed, at six in the evening and died two hours after; the jury were directed, if at the time of giving her directions she had sufficient discretion for that purpose, and at the time of executing the Will she was able to recollect the particulars which she had directed, they might find her of sound mind at the time of executing the Will.

Hathorn & al. *vs.* King.—8 *Mass. Rep.* 371.

THIS was an appeal from a decree of the probate court of the county of *Essex*, approving and allowing the last Will of *Mary Norris*, deceased. Among the reasons of appeal, one was that the deceased was not of sane mind at the time of executing the will, and on this an issue was formed to the country.

On trial it appeared that the scrivener was called in at 11 o'clock in the morning of the 21st of March last, and received from the testatrix directions as to the preparing her will. She was then very ill, and continued sinking until 6 o'clock in the evening, when she executed the will, and at a quarter past 8 o'clock the same evening expired.

The council for the appellants moved to enquire of the attending physicians, whether *in their opinion*, at the time of executing the will the deceased was of sound disposing mind and memory.

This question had been heretofore confined to the subscribing witnesses, but it was urged that the opinions of skilful physicians, who were present, were of more value, and ought to be received rather than those of the witnesses, who might possess no skill, and had but slender means of forming an opinion.

On the other hand, it was said that the question of sanity must be determined by the conversation and actions of the party. These were the only standard. The examination proposed would put the physicians in the place of the jury.

Per curiam. The physicians may be enquired of, whether from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from thence conclude that her mind was sound or unsound: and in either case, they must state the circumstances or symptoms, from which they draw their conclusions.

After the examination was finished, the evidence was minutely summed up to the jury by *Sedgwick, J.* and the jury were instructed by him (*Sewall* and *Parker* justices expressly concurring) that if they should be of opinion, that the testatrix, at the time of dictating the will, had sufficient discretion for that purpose,—and that at the time of executing the will, she was able to recollect the particulars which she had so dictated; they might find their verdict, that she was of sound and disposing mind and memory at the time of executing the will.—And they found accordingly: and the will was proved, approved and allowed by the court.

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